

1 REPORTER'S RECORD  
2 APPELLATE COURT CAUSE NO. AP-76,000 76100  
3 TRIAL COURT CAUSE NO. 04-CR-3453-C  
4 VOLUME 13 OF 25 VOLUMES

5 THE STATE OF TEXAS ) IN THE DISTRICT COURT  
6 VS. )  
7 JOHN HENRY RAMIREZ ) 94TH JUDICIAL DISTRICT  
8 ) NUECES COUNTY, TEXAS

9 INDIVIDUAL VOIR DIRE

10

11

12

13

14

15

16

17

18

19

20 On the 17th day of November, 2008, the following  
21 proceedings came on to be heard in the above-entitled and  
22 numbered cause before the Honorable BOBBY GALVAN, Judge  
23 Presiding, held in Corpus Christi, Nueces County, Texas:

24 Proceedings reported by Machine Shorthand.

25

FILED IN  
COURT OF CRIMINAL APPEALS

OCT 06 2009

Louise Pearson, Clerk

1 APPEARANCES:

2 MR. MARK SKURKA  
SBOT NO. 18475570  
3 AND  
MR. VERNON G. SCHIMMEL  
4 SBOT NO. 24033039  
Nueces County Assistant District Attorneys  
5 901 Leopard Street, Room 205  
Corpus Christi, Texas 78401  
6 (361) 888-0410

7 ATTORNEYS FOR THE STATE OF TEXAS

8

9 MR. EDWARD F. GARZA  
SBOT NO. 07731200  
10 Attorney at Law  
719 South Shoreline, Suite 201  
11 Corpus Christi, Texas 78401  
(361) 888-8877

12

13 AND

14 MR. JOHN GRANT JONES  
SBOT NO. 10917000  
15 Attorney at Law  
5826 Beauvais Drive  
16 Corpus Christi, Texas 78404-6173  
(361) 884-8141

17

18 ATTORNEYS FOR THE DEFENDANT,  
JOHN HENRY RAMIREZ

19

20

21

22

23

24

25

| 1  | INDEX   |                                |    |
|----|---|--------------------------------|----|
| 2  | VOLUME 13 OF 25 VOLUMES   |                                |    |
| 3  | VOIR DIRE PROCEEDINGS   |                                |    |
| 4  | November 17, 2008<br>Proceedings Commence.....  | PAGE 5 VOL. 13                 |    |
| 5  | (INDIVIDUAL QUESTIONING OF VENIREPERSONS)<br>PROSPECTIVE JURORS<br>VENIREPERSON GLORIA E. LIGHT, NO. 65 | Voir Dire Page 5,15,40 Vol. 13 |    |
| 6  | Accepted by the State.....  | 60                             |    |
| 7  | Accepted by the Defense.....  | 60                             |    |
| 8  | Juror No. 8 Admonished.....   | 60                             |    |
| 9  | Discussion on Scheduling of Venirepersons.....  | 61                             |    |
| 10 | Agreement to Excuse PJ No. 144.....   | 63                             |    |
|    | PJ No. 71 Struck by Agreement.....  | 64                             |    |
| 11 | LINDA HITE, NO. 70  | 65,76,92                       | 13 |
| 12 | Peremptory No. 3 by the State.....  | 92                             |    |
| 13 | DAVID CHARLES KOCHAN, NO. 64  | 93,105,124,144                 | 13 |
| 14 | Accepted by the State.....  | 145                            |    |
| 15 | Peremptory No. 9 by the Defense.....  | 145                            |    |
|    | Discussion on Scheduling of Venirepersons.....  | 145                            |    |
| 16 | JOSEPHINE GUERRERO GOMEZ, NO. 77  | 150,162,188,202                | 13 |
| 17 | Challenge for Cause by the Defense.....   | 204,207,209                    |    |
| 18 | Granted.....  | 211                            |    |
| 19 | Discussion on Scheduling of Venirepersons.....  | 213                            |    |
| 20 | TINA LOUISE TORREZ, NO. 79  | 218,226,242                    | 13 |
| 21 | Peremptory No. 4 by the State.....  | 242                            |    |
| 22 | CLARA ANN MUGUERZA, NO. 81  | 243,255,273                    | 13 |
| 23 | Peremptory No. 5 by the State.....  | 275                            |    |
| 24 | RYAN RICHARD HILL, NO. 80   | 276,287,303,321,323            | 13 |
| 25 | Peremptory No. 6 by the State.....  | 323                            |    |
| 26 | ANTONIO G. MARTINEZ, JR., NO. 49  | 324,335,351                    | 13 |
|    | Agreed Challenge for Cause by State and Defense....   | 366                            |    |
| 27 | LAURA LOPEZ HINOJOSA, NO. 82  | 367                            | 13 |
| 28 | Agreed Challenge for Cause by State and Defense....   | 371                            |    |
| 29 | CHRISTINE FOUTCH, NO. 84  | 371,379,400                    | 13 |
| 30 | Accepted by the State.....  | 413                            |    |
| 31 | Accepted by the Defense.....  | 413                            |    |
|    | Juror No. 9 Admonished.....   | 414                            |    |

| 1  | INDEX CONTINUED                                     | PAGE                | VOL.    |
|----|---|---------------------|---------|
| 2  | November 17, 2008 (Continued)                       |                     |         |
| 3  | Proceedings adjourned.....                          | 414                 | 13      |
| 3  | Court Reporter's Certification.....                 | 415                 | 13      |
| 4  | ALPHABETICAL INDEX TO VENIREPERSON                  |                     |         |
| 5  |   |                     |         |
| 6  | VENIREPERSON  | Voir Dire           | Page    |
| 6  | FOUTCH, CHRISTINE, NO. 84                           | 371,379,400         | Vol. 13 |
| 7  | Accepted by the State.....                          | 413                 |         |
| 7  | Accepted by the Defense.....                        | 413                 |         |
| 8  | Juror No. 9 Admonished.....                         | 414                 |         |
| 8  |   |                     |         |
| 9  | GOMEZ, JOSEPHINE GUERRERO, NO. 77                   | 150,162,188,202     | 13      |
| 9  |   | 204,207,209         |         |
| 10 | Challenge for Cause by the Defense.....             | 211                 |         |
| 10 | Granted.....  | 213                 |         |
| 11 |   |                     |         |
| 11 | HILL, RYAN RICHARD, NO. 80                          | 276,287,303,321,323 | 13      |
| 11 | Peremptory No. 6 by the State.....                  | 323                 |         |
| 12 |   |                     |         |
| 12 | KOCIAN, DAVID CHARLES, NO. 64                       | 93,105,124,144      | 13      |
| 13 | Accepted by the State.....                          | 145                 |         |
| 13 | Peremptory No. 9 by the Defense.....                | 145                 |         |
| 14 |   |                     |         |
| 14 | LIGHT, GLORIA E., NO. 65                            | 5,15,40             | 13      |
| 15 | Accepted by the State.....                          | 60                  |         |
| 15 | Accepted by the Defense.....                        | 60                  |         |
| 16 | Juror No. 8 Admonished.....                         | 60                  |         |
| 17 |   |                     |         |
| 17 | MARTINEZ, JR., ANTONIO G., NO. 49                   | 324,335,351         | 13      |
| 18 | Agreed Challenge for Cause by State and Defense.... | 366                 |         |
| 18 |   |                     |         |
| 19 | MUGUERZA, CLARA ANN, NO. 81                         | 243,255,273         | 13      |
| 19 | Peremptory No. 5 by the State.....                  | 275                 |         |
| 20 |   |                     |         |
| 20 | TORREZ, TINA LOUISE, NO. 79                         | 218,226,242         | 13      |
| 20 | Peremptory No. 4 by the State.....                  | 242                 |         |
| 21 |   |                     |         |
| 22 |   |                     |         |
| 23 |   |                     |         |
| 24 |   |                     |         |
| 25 |   |                     |         |

1                   PROCEEDINGS

2                   (November 17, 2008)

3                   THE COURT: All right. Who's in there? Who  
4 do we have, the guy from Friday?

5                   THE BAILIFF: Light and Hite.

6                   MR. SKURKA: What number is that?

7                   THE COURT: Okay. Well, I guess let's bring  
8 in Light. She's 65.9                   All right. Why don't you come over and have a  
10 seat. How are you today?

11                  VENIREPERSON NO. 65: Fine. Thank you.

12

13                  VENIREPERSON NO. 65,

14                  GLORIA LIGHT,

15                  VOIR DIRE EXAMINATION

16 BY THE COURT:

17                  Q. All right. You are Ms. Light, right?

18                  A. Yes, sir.

19                  Q. Gloria Light. All right. Obviously, you know we're  
20 here to pick a capital murder jury, okay, and you are one of  
21 our prospective jurors and we're gonna talk to you about some  
22 things.23                  Now, first of all, first and foremost, what we  
24 want from a juror is people that can keep an open mind. I  
25 mean, if we have people that can't keep an open mind, well,

1                  Q. All right. Okay. Let's talk about some things.

2 When you came in in the malpractice case, the plaintiff had the  
3 burden of proof, okay? The plaintiff had to prove to you  
4 whatever the malpractice was. It was their burden. In this  
5 case, the plaintiff is the State of Texas, okay? They've  
6 brought the charges, and just like in that case, they've  
7 brought the charges so they have to prove them, all right?  
8 They don't -- this -- they being the defendant and his lawyers,  
9 they don't have to prove anything?

10                 A. Correct.

11                 Q. Our law says that.

12                 A. Uh-huh.

13                 Q. The burden of proof -- and you're okay with that?

14                 A. Yes.

15                 Q. Okay. Now, the burden of proof in that case, I don't  
16 know if you recall or not, but it was by preponderance of the  
17 evidence which is like 51 percent or so. It's just a little  
18 bit more than just tipping the scales just a little bit, okay?

19                 A. Okay.

20                 Q. Sort of a probably standard, all right? We have a  
21 higher standard in criminal cases. You may know that. There's  
22 an intermediate standard which is called clear and convincing.  
23 That's higher than the standard that you used in that  
24 malpractice case and it's pretty self-explanatory. Clear and  
25 convincing, that sounds like a pretty strong language; do you

6

8

1 it's not fair. You agree with that, right?

2                  A. Uh-huh.

3                  Q. And some people can't and that's okay. We just need  
4 to know if that's you or not. Can you keep an open mind in  
5 this case?

6                  A. I believe so.

7                  Q. Okay. And when you say you believe so, what makes  
8 you think that maybe not? Now, some people when they say, "I  
9 believe so," that means yes.

10                 A. Yes.

11                 Q. But we as lawyers, that makes us kind of nervous.

12                 A. To be honest with you, I really don't know anything  
13 at all about this case so I don't really have --

14                 Q. You know what, that's just fine and dandy, okay?

15 That's actually preferable.

16                  Okay. The next thing we need to know is if you  
17 can follow the law, all right, and we're gonna talk a little  
18 bit about what that entails.19                  All right. You have been on jury before, a  
20 civil case?

21                 A. Yes, sir.

22                 Q. A malpractice. Is that a medical?

23                 A. Uh-huh, yes, sir.

24                 Q. Those have become somewhat of a rarity around here.

25                 A. It was a few years ago.

1 agree?

2                 A. Yes.

3                 Q. Okay. But what we have here is higher than that.  
4 It's beyond a reasonable doubt, all right? And sometimes I  
5 like -- you know, we don't have a definition of what that is,  
6 but when you think of it in terms of what it's not, it kind of  
7 gives you an idea of what it is. It is not preponderance of  
8 the evidence like the malpractice case. It is not clear and  
9 convincing. It's higher. On the other hand, it's not beyond  
10 all doubt, it's not beyond a shadow of a doubt. It is what it  
11 is, beyond a reasonable doubt, okay? Would you hold the State  
12 to that burden?

13                 A. Yes.

14                 Q. Okay. Next thing, along the same lines, the  
15 defendant in this case, like I told you, he has no burden,  
16 okay?

17                 A. Uh-huh.

18                 Q. The law says, State, you bring the charges, you prove  
19 them, and until you do, everyone is presumed to be innocent,  
20 okay? And that's an ancient concept going all the way back to  
21 the Greeks and Romans. The State brings the charges. If they  
22 can prove them, that's fine. Until you can, that person is  
23 innocent until proven guilty. Can you presume that?

24                 A. Right, yes.

25                 Q. And we lawyers, we like to do this. We like to ask

1 the jury somewhat, in my opinion, of an unfair question, but we  
2 ask them, if you had to vote right now, how would you vote?

3 A. Well, he's innocent, yeah.

4 Q. All right. Some people say, well, I can't vote  
5 because I haven't heard anything, and that is the right answer,  
6 okay? He's innocent until they've proven otherwise, okay? But  
7 as a practical matter, what really happens is, you know, we  
8 have a trial, and then the State presents evidence, and if you  
9 don't find that it meets the standard then you find not guilty,  
10 all right? You agree with all that?

11 A. Yes.

12 Q. Okay. Now, along those same lines, the law says if  
13 they've got no burden of proof then they don't have to present  
14 any evidence. They don't have to put their client on, okay?  
15 He doesn't have to testify.

16 Now, I think there's a lot of reason why  
17 someone may not want to testify. Maybe his lawyers think they  
18 haven't proven their case and maybe his lawyers advised him  
19 not to. I had a friend who laughed inappropriately when he  
20 got nervous and it would offend people. You know, not all of  
21 us are good speakers, not all of us do well under pressure.  
22 Maybe his lawyers think he's not that kind of person, okay?  
23 So, in any event, the law says not only does he not have to  
24 testify, not only can the State not force him to testify, it  
25 goes deeper than that. The jury that's selected can't go back

1 In this particular case what they're alleging,  
2 that is, the State, is that they have a robbery or an  
3 attempted robbery, and that the murder occurred while in the  
4 course of doing that, okay? So we have two major felonies put  
5 together, the robbery or attempted robbery, and the murder  
6 while in the course of committing. And there's – they've got  
7 to prove them both together, okay, and that's what makes it  
8 capital.

9 Now, there are a lot of elements, obviously,  
10 because they have to prove the elements of both crimes. The  
11 law says for them to prevail, that is, the State. They have  
12 to prove all of the elements of capital murder. You would  
13 hold them to that?

14 A. Yes.

15 Q. Now, in a murder case, if let's say it was a plain  
16 murder -- I don't -- just murder, like I told you, it was a  
17 first degree felony and the punishment range is five years to  
18 99 years or life. We have a bifurcated system in Texas which  
19 means the first part of trial is merely the guilt or innocence  
20 phase. That is, jury decides whether the -- after hearing all  
21 the evidence presented, whether the State's met their burden,  
22 and they either say guilty or not guilty. And if they say not  
23 guilty, well, the case is over with. But if they say guilty,  
24 then we go on to the second phase. Now, if this was just a  
25 murder case and the defendant was found guilty, the jury would

10

12

1 there and consider it and hold it against him. Some people  
2 say, well, I like to hear both sides of the case and I like to  
3 hear both sides of the story to make a decision. It's -- this  
4 isn't really like that, really, because they've got the burden  
5 of proof. And since they've got the burden of proof they've  
6 got to cross the finish line and it's not like a race between  
7 this side and that side. It's all this side's -- the only  
8 thing that matters is this side's ability to cross that line,  
9 that reasonable doubt finish line.

10 A. Okay.

11 Q. Okay. Can you -- can you follow that law and not  
12 hold it against the defendant if he chooses not to testify?

13 A. Yes.

14 Q. Okay. All right. Now, let's talk a little bit about  
15 the kind of case this is. A lot of people think that when  
16 someone takes a life of another intentionally, that the death  
17 penalty is always a possibility, okay? Not the case. That  
18 would be just regular murder, okay? I've called it plain  
19 murder, I've called it regular murder. I don't know any other  
20 way to say it. It sounds inappropriate, but nonetheless,  
21 intentional taking of a life of another, that's murder, and --  
22 and that's a first degree felony and it's a serious offense,  
23 but it is not capital in and of itself. The legislature has  
24 laid out a laundry list of things that are capital murder and  
25 there's I don't know how many.

1 go back and decide between five years to 99 years or life, and  
2 in some cases probation may be an option, and they would come  
3 up with something and then they would write down the amount in  
4 the little blank. We don't do that in capital cases. What we  
5 do in capital cases is we answer questions.

6 You must know there's two possibilities if  
7 someone's found guilty of capital murder in Texas and that is  
8 life imprisonment or the death penalty, both serious  
9 punishments, okay? But like I said, they answer questions.  
10 And the jury would first answer this one up here.

11 "Is there a probability that the defendant  
12 would commit criminal acts of violence that would constitute a  
13 continuing threat to society?"

14 Okay. Is he probably gonna be a violent  
15 person to people in the future? Essentially, it's the future  
16 dangerousness question is what we call it. The jury would  
17 answer yes or no. Then the jury would go over to Special  
18 Issue No. 2 which says, "After taking into consideration all  
19 the evidence, including the circumstances of the offense" --  
20 that's the first part of the case, the guilt or innocence --  
21 "the defendant's character and background, and the personal  
22 moral culpability of the defendant, is there a sufficient  
23 mitigating circumstance or circumstances that warrant a  
24 sentence of life imprisonment rather than a sentence of death  
25 be imposed?" Okay. So what's that all about?

1 Well, the first part of the trial all you're  
 2 gonna hear about is the allegations of the crime itself. In  
 3 other words, what happened that day, and if they can prove  
 4 that the defendant committed the offense of capital murder,  
 5 well, then you go to the second phase. The second phase you  
 6 might hear a whole lot more. Now, keep in mind, we had a  
 7 juror last week who said, well, you know, I -- when you're  
 8 talking about the second part so assume we're getting there.  
 9 I said, no, we're not. We have to legally talk about these  
 10 things, all right? It's not -- it's not -- I don't mean to  
 11 suggest that we're getting there because we're talking about  
 12 this stuff, but we do need to talk to you about it at this  
 13 point because we don't get another chance to talk to you, all  
 14 right?

15 Now, this assumes that you have found the  
 16 defendant guilty and you get to consider everything on the  
 17 first part of the trial. But at the second part of the trial  
 18 you may hear a bunch of other stuff about it, what kind of guy  
 19 has he been, other than that day. Maybe he's been a good guy,  
 20 maybe he's been a bad guy. Maybe he's a scoundrel, maybe he's  
 21 the best guy you'd ever know and just, you know, that was  
 22 completely out of character. Do you follow me?

23 A. Uh-huh.

24 Q. Maybe he had a bad criminal history, maybe he's  
 25 clean. And those are the mitigating circumstances or

1 A. Yes.

2 Q. Okay. Then let's go to the punishment phase if we  
 3 get there.

4 Some people tell me, Judge, I could do the guilt  
 5 or innocence phase, but answering these questions, I cannot do,  
 6 because I cannot participate in a process that can lead to the  
 7 possibility of a death penalty, all right? I also get other  
 8 people that tell me, hey, look, I could give him a fair trial  
 9 on the first part of the case, but if we found him guilty, the  
 10 law means nothing to me. It's death. I'm not considering your  
 11 law. I'm gonna answer the questions in such a way that the  
 12 defendant will get the death penalty and neither of those  
 13 people can take the oath. I need to know if you can take the  
 14 oath on the second part of the trial as well?

15 A. Yes.

16 Q. All right. Then I'm gonna turn you over to the  
 17 State. They get to go first because they've got the burden of  
 18 proof.

#### VOIR DIRE EXAMINATION

##### EXAMINATION BY MR. SKURKA:

21 Q. Good morning, Ms. Light. My name is Mark Skurka, I'm  
 22 an assistant district attorney along with Geordie Schimmel  
 23 here. We'll be the ones presenting the case to you if you're  
 24 selected on this jury. The judge has gone over some legal  
 25 parts but I want to go over some more in a little more detail

14

16

1 aggravating circumstances, and then you have to decide whether  
 2 there are sufficient mitigating circumstances to warrant life  
 3 or death, okay?

4 A. Uh-huh.

5 Q. What is a mitigating circumstance? Well, these  
 6 lawyers will suggest to you what that is, but the fact of the  
 7 matter is, it's up to the jury to decide what that is. A juror  
 8 may think that maybe he was an Eagle Scout, okay? Maybe he was  
 9 an Eagle Scout. Well, that's a circumstance one juror may say.  
 10 The other juror may say, that doesn't mean anything to me.  
 11 That is not a mitigating circumstance, or if it is, it's not a  
 12 sufficient mitigating circumstance to meet this test, okay? Do  
 13 you follow --

14 A. Uh-huh.

15 Q. -- how this questioning goes? And the jury would  
 16 answer yes or no to this question.

17 Now, at the beginning of every trial -- and I'm  
 18 sure you were -- you went through this process when you sat as  
 19 a juror on this civil case. You know, I raise my right hand,  
 20 the jurors all raise their right hands, and I swear them in,  
 21 and they swear to render a true verdict based upon the law and  
 22 the evidence presented to them and we begin.

23 What I need to know -- we're gonna break it up.  
 24 I need to know if you can take that oath in this case on the  
 25 guilt or innocence phase?

1 and just to make sure we're all on the same page.

2 Let me start by telling you there's no right  
 3 or wrong answers to anything. We just want to know how you  
 4 feel about certain things, so don't answer in such a way that  
 5 you think the judge wants to hear or I want to hear and the  
 6 defense wants to hear. We just want to know how you feel,  
 7 okay?

8 A. Okay.

9 Q. Nobody's gonna argue with you about your feelings or  
 10 how you feel about certain things. We just want to -- need to  
 11 make sure that you're qualified to sit in this case, okay?

12 A. Okay.

13 Q. Tell me about how you felt that very first day when  
 14 you found out it was a capital murder case. The judge came  
 15 in -- remember that room with like two or 300 people in there  
 16 and the judge came down and said, "Folks, this is gonna be a  
 17 criminal case, and not just so that it's any criminal case. If  
 18 you're selected on the jury, you might have to decide on  
 19 whether to give somebody the death penalty or not." When you  
 20 heard it was that kind of a case, a possible death penalty  
 21 case, tell me what your first reaction was.

22 A. Oh, intriguing, being part of the process, just  
 23 seeing how -- how it worked and just being part of it.

24 Q. So it was kind of interesting and intriguing to you?

25 A. Yeah.

1 Q. And you had never been on a criminal case before?

2 A. No, sir.

3 Q. I think the judge pointed out you were on a civil  
4 case?

5 A. Correct.

6 Q. You know, I was watching some people out there and I  
7 don't know if you saw any of your neighbors around you in the  
8 audience, some of them were going like, "Oh, my gosh, a capital  
9 murder case." And some people were going, "Oh, okay, that's  
10 sounds good." You know, it's like people -- I don't want to  
11 say freak out, but they were going, "Oh, my gosh, I can't make  
12 a decision like that. I thought it was just gonna be like, you  
13 know, a little shoplifting case or a DWI case." And they found  
14 out they're gonna have to make that kind of decision.

15 How did that strike you having to make that kind  
16 of decision?

17 A. I feel very strongly about the -- our court system. I  
18 feel like it's not perfect by any means, but that it is the  
19 best that there is. There's -- you'd be hard pressed to find a  
20 better system. I feel like it's a civic duty, that if I was in  
21 his position that I would want people to be willing to  
22 participate in it.

23 Q. So it sounds to me that you've given an answer --  
24 several jurors have -- it really doesn't matter what kind of  
25 case it is, it's my civic duty to sit on a jury because that's

1 read about in the newspaper or hear on TV or something like  
2 that. That's him, right there. Take a look at him. That's  
3 John Henry Ramirez. When you first walked in the courtroom you  
4 saw this guy sitting over there and you thought -- at least  
5 some jurors probably thought, oh, my gosh, I might have to make  
6 a decision whether he lives or dies. Do you think you can do  
7 that if the evidence calls for it?

8 A. I believe so.

9 Q. Okay. The reason I ask is this because I've told you  
10 from day one, I mean, we came out and we said, "Our office, the  
11 DA's office, has decided to seek the death penalty in this  
12 case." As you know, there's two choices, death or life in  
13 prison and we've decided to seek the death penalty. I just  
14 want to know if I've got a person up there in you that can  
15 actually carry it out if they think the evidence is there. And  
16 when I say carry it out --

17 A. I think you have --

18 Q. I don't mean --

19 A. I understand. I think you have a person that will  
20 look at both options.

21 Q. That's what you have to have because that was my next  
22 question. You should be able to look at him too and say, "I  
23 haven't made up my mind yet." Maybe I hear the evidence and I  
24 should give life. Maybe I should hear the evidence, I should  
25 give death. Can you equally consider --

18

1 what the law called me to do?

2 A. Pretty much.

3 Q. Is that -- I don't want to put words in your mouth --

4 A. No. Yeah, that's --

5 Q. -- but does that make sense?

6 A. Yeah.

7 Q. So when you heard it was a capital murder case and  
8 there's a possibility of death penalty you're saying, "I'm here  
9 to serve whatever they want me to serve as a juror. As a  
10 citizen, I have to come in and listen to the evidence and make  
11 a decision based on that." Is that pretty much how you feel?

12 A. Pretty much.

13 Q. The reason I ask that is because some people kind of  
14 feel the same way as you, and they say, "Yeah, I understand  
15 it's my civic duty. I understand I have to make decisions, but  
16 gosh, why do you start me off with such a big decision?" It's  
17 an awesome responsibility. And although people shouldn't --  
18 I'm not gonna say people are happy about sitting on a jury or  
19 want to sit on a jury like that, but it's a pretty big  
20 responsibility, and I just want to know if you feel that you  
21 could actually carry that out, if called upon, based on the  
22 evidence and the law?

23 A. I believe so.

24 Q. Okay. Because we're not talking about, you know,  
25 something in a vacuum. We're not talking about something you

20

1 A. Absolutely, yes.

2 Q. -- both of those things?

3 A. Yes.

4 Q. And that's what we need to know. Tell me what you  
5 think about this statement.

6 "People shouldn't make decisions as a juror on  
7 the way a person looks, but they should make the decision on  
8 what they did."

9 A. Repeat that, please.

10 Q. "People shouldn't make a decision on how a person  
11 looks, but should make a decision on what they did."

12 A. I think you have to look at both. It's unavoidable.

13 You're going to have first impressions. That's a fact. You're  
14 gonna have first impressions, and that is strictly on  
15 appearance, body language, a little bit, what have you. That  
16 is going to have some bearing. I don't think you can avoid it.

17 Q. In a court of law you think it should work that way?

18 A. Umm...

19 Q. Here's what I'm getting at. Let me stop you because  
20 I think we're getting off track a little bit. We've had some  
21 jurors come in and I asked them, "How did you feel when you saw  
22 this guy was the defendant?" Because a lot of people say,  
23 "Well, gosh, you know, he looks very young. He doesn't look  
24 like he could hurt a fly." He looks like this today. And I  
25 always tell them, "Wait a minute, you haven't heard any

1 evidence." And so when you make the decision based on a  
 2 person's youth and how they look today, you should really make  
 3 it based on what the evidence shows --

4 A. Evidence, absolutely.

5 Q. -- and is.

6 A. Evidence is going to, hopefully in this situation,  
 7 and I believe in my decisions, it would be on the testimony.  
 8 But I can't lie to you either and say that first impressions  
 9 aren't going to have some bearing, but you have to listen to  
 10 the testimony.

11 Q. Do you think age should be a difference on whether --  
 12 make a difference on whether somebody's guilty or not?

13 A. No.

14 Q. And let me preface that by saying, in Texas, the law  
 15 says you can't execute somebody over 18 years old (sic). If  
 16 you're 16 or 17 and do the worst crime imaginable, you're not  
 17 eligible for the death penalty. They say you have to be  
 18 majority of at least 18 years old. Do you believe that most  
 19 people know the difference between right and wrong by the time  
 20 they're 18 or know what the laws are by the time they're 18?

21 A. Do they know what the laws are?

22 Q. Well, I don't mean it that way. I guess know the  
 23 difference between right and wrong?

24 A. I believe by the time they're 18 they know right from  
 25 wrong.

1 Manson, or isn't as young as Charles Manson, something like  
 2 that?

3 A. No.

4 Q. Okay. Do you think we should have the death penalty  
 5 in Texas?

6 A. Yes.

7 Q. Why?

8 A. I think the first issues, specifically it's -- if  
 9 they're gonna be a continuing threat to society, the risk of  
 10 them being able to leave prison, even life, you still have that  
 11 chance of getting out. I would hate to be responsible for  
 12 giving someone life than getting out and performing another act  
 13 of violence against society. There's just some that I don't  
 14 think should be released into society.

15 Q. Do you think it's good that a jury makes that  
 16 decision? Because I'll tell you, you know, as powerful as a  
 17 district judge is, Judge Galvan cannot sentence somebody to  
 18 death. As powerful as Carlos Valdez, the district attorney is,  
 19 he can't sentence somebody to death. Our laws say only 12  
 20 people sitting in our jury can make that decision. Do you  
 21 think that's a pretty fair arrangement?

22 A. I think it's preferable. You know, the jury comes  
 23 through and they see the news and they read newspapers and you  
 24 can watch *True TV*, and you know, you're not really subjected to  
 25 it day in and day out so you don't get that cynicism or a bad

22

1 Q. So whether a person is 25, 35, 45, 55, as long as  
 2 they're over 18, you think they should be held to the same  
 3 standard?

4 A. Yeah.

5 Q. Under the law?

6 A. Under the law, yes.

7 Q. Obviously, everybody has different views, but I just  
 8 want to know if the fact that he seems to be young -- here's  
 9 where I'm getting at. A lot of times people come in there and  
 10 tell them the person's charged with murder, capital murder and  
 11 they expect to see Charles Manson sitting over there, you know,  
 12 scary looking Charles Manson, and they found out it's a young  
 13 looking guy and they think, wow, he's a young looking guy. And  
 14 I always tell them, "Well, do you make a decision on how he  
 15 looks in the courtroom today, or do you make a decision on what  
 16 he did that day?"

17 Now, I always talk about Ted Bundy, you know.  
 18 Ted Bundy was supposed to be this handsome, dashing young man,  
 19 and you know, he killed a whole bunch of women. And if you  
 20 made a decision on how he looked that would probably be not  
 21 appropriate to what he did. And that's all I'm trying to get  
 22 at.

23 Do you have any problems about seeking the  
 24 death penalty, or if the evidence warranted it, seeking the  
 25 death penalty to a person that doesn't look like Charles

24  
 1 view of society, you know. We come in and we're basically, you  
 2 know, life's good. People are honest and you have to prove to  
 3 me that he's not. I think I can -- that freshness, I think, is  
 4 important. I think if a judge was responsible for making that  
 5 decision, that it could get dangerous because seeing what they  
 6 see day in and day out, it could make them --

7 Q. A little more jaded or cynical?

8 A. Yes, yes.

9 Q. And that makes sense. And I didn't write the  
 10 Constitution, but that's probably a good reason. We didn't  
 11 want all the power to be in one person.

12 A. Right.

13 Q. We wanted to have the power to the people. And, you  
 14 know, sometimes people say, "Well, it's not the greatest system  
 15 in the world, there's been mistakes made." But would you agree  
 16 with me it's probably the best system we have out there?

17 A. Yes.

18 Q. Let's talk about some of the other parts of the  
 19 trial. Remember that this becomes a capital murder case only  
 20 if it's murder plus something else; plus a robbery, rape,  
 21 kidnapping -- burglary, robbery, kidnapping. And they also  
 22 have other parts, like killing a kid under six, or killing a  
 23 cop on duty, things like that. There's very few things that  
 24 even qualify for capital murder. In other words, sometimes  
 25 people tell me, "Well, gosh, you know, he murdered somebody, he

1 automatically gets the death penalty." I go, "No. What  
 2 happens is you have to have that kind of case that qualifies as  
 3 a death penalty, and then by no means is it automatic. You  
 4 have two choices, death or life in prison." And so a lot of  
 5 people, we have to kind of tell people the very first day it  
 6 doesn't work the way you think it does or the way it is on TV  
 7 God forbid. It's really kind of carefully considered out that  
 8 it's only gonna happen if certain requirements are met.

9           In this case, we're alleging murder while  
 10 committing robbery or attempting to commit robbery, and notice  
 11 that word "attempting" to commit robbery, or while in the  
 12 course of committing robbery. It doesn't have to be a  
 13 successful robbery. It doesn't have to be a finalized robbery.  
 14 It could be any time in the course of committing a robbery.  
 15 It's like a guy robs a bank and he's heading out the door with  
 16 a bag full of money and the cops catch him. Can he go up to  
 17 court and say, "Well, I'm not guilty, I didn't get away with  
 18 it, I didn't really get all the money." No. The law says as  
 19 soon as you take something by force, or by threats of force,  
 20 and you're taking something, whatever it is, that's enough to  
 21 be a robbery. Do you follow me on that?

22       A. Uh-huh.

23       Q. Okay. And in Texas, we don't have -- we have two  
 24 parts of the trial. The first part is guilt or innocence, then  
 25 the second part is punishment. The first part is whether he

1 get to hear some more evidence. You might get to hear some  
 2 from both the State or the defense, but remember the defense  
 3 doesn't have to prove anything about his background. You  
 4 might get to hear -- I think the judge said he was an Eagle  
 5 Scout, or maybe he was on the honor roll in high school. Or  
 6 you might hear, hey, he's a bad kid, always been in trouble  
 7 all his life. I don't know. So based on that evidence -- in  
 8 addition, you can use the evidence you heard on the first part  
 9 of the trial, like how heinous the crime was or it was a mild  
 10 crime or whatever, but then you go to the questions.

11           The first question says, "Is there a  
 12 probability that defendant would commit criminal acts of  
 13 violence that would constitute a continuing threat to  
 14 society?" We call that the future dangerousness question. In  
 15 other words, is he gonna be a danger in the future, you know,  
 16 to hurt somebody. The key words in there I want you to look  
 17 at is the first line it says, "Is there a probability --"  
 18 Now, unless you have a crystal ball and you can say for  
 19 certain what's gonna happen. There's no way we can prove that  
 20 to you, and the law doesn't require me to prove it beyond all  
 21 doubt or certainty. It just says is it probable which means  
 22 more likely than not.

23           The question then says, "-- that the defendant  
 24 would commit criminal acts of violence." That's kind of  
 25 broad. Criminal acts of violence can be anything. Sometimes

1 did it or not. Did he do it or not? Is he guilty or not  
 2 guilty? And, generally speaking, the evidence is confined to  
 3 just, you know, what happened that day. Did he do the crime,  
 4 no matter what it is, did he do that crime? You might hear  
 5 some surrounding circumstances before and after, but generally,  
 6 you just hear that one thing.

7           Then the second part of the trial -- and I'm  
 8 sorry -- and then if you find him -- you can find him either  
 9 guilty or not guilty. If you find him not guilty, the trial  
 10 ends. If you find him guilty, then you go to the second phase  
 11 of the trial.

12           In most criminal cases, what you do, is you  
 13 get a range of numbers to pick from. Like say a burglary case  
 14 is two years to 20 years in prison. You know, some people can  
 15 give them a very high sentence or a low sentence. There's a  
 16 big range to fit in and you pick a number. In death penalty  
 17 cases it's a little different. You don't just vote, I vote  
 18 for death or I vote for life and check it off. You answer two  
 19 questions. And it's how the jury answers those questions  
 20 become -- tells the judge what he has to do in this case. And  
 21 they're behind you, and you've already talked about one and I  
 22 want to go over that one with you a little bit if you'd look  
 23 at it with me.

24           The second -- oh, I'm sorry. Before I talk  
 25 about the questions, before you get to that part, you might

1 jurors say, "Well, I thought I could only vote for the death  
 2 penalty if I thought he was gonna murder somebody again or  
 3 commit capital murder again." And I tell them, It doesn't say  
 4 that. It just says criminal acts of violence. It could be  
 5 almost anything.

6           And then the last part says, "-- that would  
 7 constitute a continuing threat to society." And I think you  
 8 brought that up earlier about there are certain cases where  
 9 you think he will be a continuing threat to society. And  
 10 sometimes people tell me, "Well, you know, if -- why do you  
 11 seek the death penalty? Just lock them up in prison and that  
 12 way they can't hurt anybody." And you were mentioning the  
 13 fact that maybe later on they'll get out. But let me ask you  
 14 when they're in prison themselves, who else is in a prison?

15       A. The criminals.

16       Q. I know, but who else besides him?

17       A. Guards.

18       Q. Right. And who else?

19       A. Other prisoners.

20       Q. Other prisoners. Maybe people that work at the  
 21 prison, like the warden and his staff, or clerical people or  
 22 maintenance people. In other words, we don't put people on a  
 23 desert island where they're never gonna have interaction with  
 24 any other human being. In fact, have you ever heard of that  
 25 happening like, you know, prisoners, you know, hurting guards

1 or hurting other prisoners?

2 A. Uh-huh.

3 Q. Sure you have. So just the fact that they've been  
4 locked up in prison, does that mean that they're not gonna hurt  
5 anybody else again?

6 A. No.

7 Q. Of course not. And that's what I'm trying to point  
8 out to you, continuing threat to society. Prison is actually  
9 still in society. I mean, you have limited rights, but you're  
10 still interacting with other people.

11 A. Uh-huh.

12 Q. And would you agree with me there?

13 A. Yes.

14 Q. It's kind of hard to think about.

15 A. I hadn't thought about it before.

16 Q. Most people don't think about it that, but, you know,  
17 you really still interact with other people in society. So  
18 it's not a guarantee they're gonna hurt anybody if you get sent  
19 to prison. And that's a question you have to say. "Is there a  
20 probability that the defendant would commit criminal acts of  
21 violence that would constitute a continuing threat to society?"  
22 Do you think he's gonna be a danger in the future? And you can  
23 make that decision based on the crime itself, and then maybe  
24 his background.

25 The second question then goes to this board

1 don't like burglars. I think we should hammer these guys  
2 because they're both bad burglars. Then you hear the facts  
3 and circumstances of the case. The first case is a burglar  
4 where you hear that he is -- he has kicked in the back door,  
5 broken the door off the hinges, kicked it in, ransacked the  
6 whole house. He stole money, jewelry, TV, VCRs, stereos, all  
7 that expensive stuff. And then, he went what he did was after  
8 he got all this stuff, he took it to a fence and sold it to  
9 buy drugs, you know, to get drugs. And then you find out his  
10 background, he's been to prison twice before for burglary.  
11 His background is bad. So you look at all that stuff.

12 Now you're having the second burglar. Now,  
13 he's also gone into somebody's house and stole something  
14 without permission, but there's a little difference. And you  
15 hearing that that he didn't kick in the back door or breaking  
16 the window to break into the house. The back door was  
17 unlocked and so he went into the kitchen through the back  
18 door. And you find out that that house had jewelry, money,  
19 stereos, TVs, VCRs. He didn't take any of that stuff. All he  
20 took was food and loaf of bread to feed his kids who are  
21 hungry and lost his job, and so, he needed food to feed his  
22 kids. And that's all he did was steal food. He didn't take  
23 any of the other stuff. And then you found out his background  
24 was a little different. Never been in trouble before with the  
25 law. That's the first time he's ever been arrested for

30

32

1 here, and we call that the mitigating circumstance question.  
2 Mitigating circumstance means -- mitigating, the word  
3 mitigating means anything that would lessen or make less severe  
4 the punishment. In other words, he did the crime, but is there  
5 any reason why you should lower the sentence, give him a break?  
6 Well, let's think about that for a minute.

7 Mitigating circumstance. Anything that reduces  
8 the defendant's moral blameworthiness, and really, anything  
9 that would lessen the sentence. Have you ever seen in the  
10 paper sometimes where it will be two people convicted of the  
11 same crime and one gets like a high sentence of 20 years in  
12 prison and one gets five years probation? My wife used to tell  
13 me, "How come that burglar got 20 years and that burglar got  
14 five months probation or five years probation?" Why would you  
15 think something like that would happen?

16 A. Because it would have to be the mitigating  
17 circumstances.

18 Q. It depends on what the surrounding circumstances are.  
19 I always have to tell people, not all cases are alike, not  
20 everybody's background is alike.

21 Let's give you an example. Say, for example,  
22 you're a juror on two burglary cases and both of them were  
23 burglars and they both went into somebody house and stole  
24 something without permission. That's the definition of  
25 burglary. And you're thinking, my gosh, I'm a homeowner, I

1 anything.

2 Now, you've got two burglars that are both  
3 equally guilty of burglary, but would you punish them exactly  
4 the same?

5 A. Huh-uh.

6 Q. Probably not, and that's a good example of this. One  
7 has aggravating circumstances that would make the sentence go  
8 high; one has mitigating circumstances. See it's kind of a  
9 trick question because before you think about all the  
10 surrounding circumstances you just consider both burglars. But  
11 I mean, the first guy tore up the house stealing everything  
12 going and selling the stuff for drugs, bad criminal history.  
13 Those are clearly aggravating circumstances. In the other one,  
14 you know, not breaking any in, stealing something but only  
15 food; not taking the other stuff. And, in fact, he had never  
16 been in trouble before with the law. My gosh, you're not gonna  
17 give him a higher sentence as the other. That's what this  
18 question is all about. That's really what it all boils down  
19 to. Because if you get to this question, you found the person  
20 guilty of capital murder, you think he's a continuing threat to  
21 society, but the judge says, Wait, jury, before you decide the  
22 death penalty -- because it looked like he's heading that way,  
23 right?

24 A. Uh-huh.

25 Q. Before you decide the death penalty, take into

1 consideration all of the evidence, look at the big picture,  
 2 including the circumstances of the offense, like what he did  
 3 that day. Was it a real heinous crime or was it kind of a  
 4 minor crime? You look at the defendant's character and  
 5 background. Good character, bad character; good background,  
 6 bad background, and his personal moral culpability. Is there  
 7 enough, is there sufficient mitigating circumstance or  
 8 circumstances to warrant that a sentence of life rather than  
 9 the death sentence be imposed? That's where you do that  
 10 balancing test just like the burglar. You know, if you had  
 11 made a decision without hearing all the evidence, it would have  
 12 been hard for you. But in that case you heard one had some  
 13 possible mitigating circumstances.

14 And what the judge said earlier is exactly  
 15 right. No one can tell you what's a mitigating circumstance.  
 16 It's up to the folks on the jury. The defense lawyer may  
 17 bring up stuff like he was an Eagle Scout, he was on honor  
 18 roll, something like that. I may bring other stuff up. You  
 19 just never know till you hear everything. And that's the kind  
 20 of background you want to hear before you make a decision.  
 21 And then the question is -- I always like to say it's kind of  
 22 like checks and balances, you know. You're looking like he's  
 23 gonna get the death penalty, but let's not rush into things.  
 24 Look at the big picture and say, is there enough to lower the  
 25 sentence. Just because there's a mitigating circumstance, a

1 yourself drunk or high on drugs, and you go commit a crime, is  
 2 that an excuse for the crime?  
 3 A. No.  
 4 Q. Absolutely not. That's what the law says. The law  
 5 does say, however, that it's a possible mitigating circumstance  
 6 that you can consider in punishment. In other words, some  
 7 people may say, "Well, he robbed that bank but he was drunk  
 8 when he did it so we'll cut him a break." Other people may  
 9 say, "I don't care if he was drunk or not, that's not enough to  
 10 warrant to get him a lower sentence." He still shouldn't be  
 11 robbing the bank. See what I'm saying?

12 A. Uh-huh.

13 Q. And the judge says it's a possible mitigating -- the  
 14 law says it's a possible mitigating circumstance. It doesn't  
 15 mean it has to be.

16 Okay. The last little area I want to talk to  
 17 you is a few legal things. First of all, remember the person,  
 18 just the fact that he's indicted does not mean he's guilty of  
 19 the crime. He starts with the presumption of innocence. Do  
 20 you remember that, the judge talking about that?

21 A. (Nodding head up and down.)

22 Q. Basically, that means that everybody starts their  
 23 thing with the -- their trial with the presumption of  
 24 innocence. It doesn't mean he is innocent. It just means he  
 25 starts with that presumption. You can't start leaning against

1 possible mitigating circumstance, do you automatically lower  
 2 the sentence? No. Some people may say, well, okay, they said  
 3 he was a war hero and he was a decorated veteran. That's  
 4 still not enough to outweigh, you know, the crime what he did.  
 5 Other people may say, well, you know, because he was a hero in  
 6 the war, we're gonna give him a break. You see what I'm  
 7 saying? Amongst the jurors they can have trouble deciding  
 8 some mitigating circumstances.

9 All I'm telling you is it's up to the jury to  
 10 decide and it's got to be enough of a circumstance or  
 11 circumstances to outweigh it. Because almost -- I can say you  
 12 can always find good somewhere in a person, but you have to  
 13 say, is that good enough to outweigh all the other stuff. Is  
 14 that a fair assessment of how to look at things?

15 A. Uh-huh.

16 Q. I mean, you want don't want to rush into things. You  
 17 want to make sure you have everything and to make a decision.

18 Now, one other thing the judge may say is a law  
 19 that goes like this: Okay. Voluntary intoxication --

20 THE COURT: Mark, I need one second.

21 (Pause.)

22 THE COURT: I'm sorry. Go ahead.

23 Q. (BY MR. SKURKA) One of the laws the judge may give  
 24 you says this. "Voluntary intoxication is not a defense to  
 25 crime." Voluntary intoxication. In other words, if you get

1 him. You have to start him off with being innocent and I have  
 2 to prove the case beyond a reasonable doubt, which is pretty  
 3 fair. Like the judge said, "The State says if you're gonna  
 4 charge him with something you've got to back it up and prove it  
 5 beyond a reasonable doubt." And I will tell you, I have that  
 6 burden in this case and in every criminal case. There's  
 7 nothing special in a capital murder case. We always have to  
 8 prove the case. But the indictment doesn't mean anything.  
 9 It's just say way to bring them into court.

10 And remember the Fifth Amendment. A person  
 11 can testify if he wants to, but if he doesn't want to, he  
 12 doesn't have to. And you can't hold that against him. You  
 13 wouldn't hold it against him if he doesn't testify. And  
 14 remember, they don't have to put on any evidence. They could  
 15 put on evidence or they don't have to put any on evidence.

16 Would you like some water or something?

17 A. Yeah, please.

18 THE COURT: Get her some water.

19 MR. SKURKA: The bailiff will get you  
 20 something.

21 VENIREPERSON NO. 65: I've got this crud  
 22 that's been going around the office.

23 THE COURT: I've got some cough drops too.  
 24 MR. SKURKA: I think we've all been fighting  
 25 off colds.

1 VENIREPERSON NO. 65: It's just allergies in  
2 Corpus.

3 THE COURT: Especially with the cold fronts  
4 blowing in all that cedar.

5 Q. (BY MR. SKURKA) Okay. And as I was saying, remember  
6 he can testify, but he doesn't have to, and you can't hold that  
7 against him. They don't have to put on any evidence on and  
8 that it's a natural thing for some jurors to say, "Well, gosh,  
9 you know, I can't make a decision. I want to hear the other  
10 side of the story." But you may not, you know, and you just  
11 can't hold that against him. You're making a decision based on  
12 the evidence presented to you, not what they could have said or  
13 should they have said something. You can't do that.

14 And the burden in this case is beyond a  
15 reasonable doubt. All that means is it's beyond a reasonable  
16 doubt. It doesn't mean it's beyond all doubt or a shadow of a  
17 doubt or any doubt. I mean, there would be no way I could  
18 prove it to you beyond all doubt. I mean, you'd have to be a  
19 witness and see the thing yourself, and of course, you  
20 couldn't be on the jury.

21 So the bottom line is, you'd be able to listen  
22 to all sides of the story -- I'm sorry. You're not leaning  
23 one way or the other, right? Guilty or not guilty, at this  
24 point, correct?

25 A. Correct.

1 plumbing systems and sometimes they're building schools?  
2 A. We -- we have friends that ran the printing press for  
3 tracks and that kind of thing; teachers that taught the kids  
4 freed up the parents to do their work. Yeah, I mean, it could  
5 be anything.

6 Q. That makes a lot of sense. I didn't know how it  
7 worked. I just thought missionaries had to do everything.

8 A. No. We went -- it was a Christian school and like I  
9 say, he built a teacher training college, some housing, some  
10 primary schools. That's what we did.

11 Q. And where was this at?

12 A. In Zambia and then we moved to Botswana and did more  
13 bush work and started kind of a missionary supply center. They  
14 would come and stay and help them get vehicles repaired and  
15 building supplies and whatever they needed.

16 Q. Did you find that work rewarding?

17 A. Extremely.

18 Q. It seems like you did it for a long time?

19 A. Uh-huh.

20 Q. Aren't those areas kind of dangerous these days? I'm  
21 not sure where they're having all these civil wars but it seems  
22 like some of those areas seem very dangerous now for  
23 missionaries.

24 A. Certain parts are, but it's like I can go in parts of  
25 Corpus and it be just as dangerous.

1 Q. And you could consider both a life sentence or death  
2 sentence equally, depending on what the evidence is?

3 A. Yes.

4 Q. How was it that you became a missionary? Can I ask  
5 you that? You have such an interesting background. I was  
6 looking at it. I was trying to figure out how you went from a  
7 missionary to the oil and gas business?

8 A. My first husband was a carpenter by trade in building  
9 and we had been going to church and they had a -- a guy came  
10 and spoke about you know para missionary doing work that  
11 supports and frees up missionaries who have been trained to do  
12 the Bible studies and the preach part of it. It frees them up  
13 to be able to do what they went over to do and so we went over  
14 and he built schools. So that's how it started.

15 Q. So that's when they call them, para missionaries?

16 A. Uh-huh.

17 Q. I never heard of that phrase. But they're the ones  
18 that kind of do, I guess for lack of a better word, lay the  
19 groundwork --

20 A. Yeah, support group.

21 Q. -- and do the support stuff? And it frees the other  
22 people to do the preaching and the teaching and stuff?

23 A. Right.

24 Q. Because my understanding of missionaries, sometimes  
25 they're helping grow crops and sometimes they're fixing

1 Q. That's a good point.

2 THE COURT: That's a good point.

3 Q. (BY MR. SKURKA) That's a good point.

4 A. You learn which areas are dangerous and which areas  
5 aren't, and you develop friends with the locals and they kind  
6 of steer you, and actually, kind of protect you. It's -- it  
7 was a very good place to live.

8 Q. Well, that's an intriguing background. I don't think  
9 I've ever met somebody who did that but that sure makes sense  
10 because they need plumbers and carpenters just as much --

11 A. Yeah.

12 Q. -- as doing the teaching.

13 It was nice visiting with you, Ms. Light. I  
14 don't think I have any other questions. I'll let the defense  
15 lawyers talk to you now.

16 VOIR DIRE EXAMINATION

17 BY MR. JONES:

18 Q. It's going to be me. Let's see. Where do we begin?  
19 I'd like to start off where Mr. Skurka left off on these  
20 special issues. That's extremely important for anybody sitting  
21 on a capital murder jury to understand the procedure you to  
22 understand what is -- what your duties are.

23 First of all, the death penalty is an authorized  
24 form of punishment in Texas. It can be imposed only in certain  
25 cases. All of them are homicides which have an aggravated

1 circumstance attached to them, as the judge told you. You  
 2 basically told us in your answers to the questionnaire and in  
 3 your answers here that you generally believe that we should  
 4 have the death penalty for certain cases. It's true?

5 A. Yes, sir.

6 Q. Do you believe that the Texas society -- and I say  
 7 Texas because states have the choice to have the death penalty  
 8 or not. Do you think that Texas society benefits from having  
 9 the death penalty?

10 A. I do.

11 Q. Okay. Could you articulate what those benefits or  
 12 benefit, one or more?

13 A. One or more. I think there's a lot to be said for  
 14 people if they know what the punishment is. They will kind of  
 15 tweak their behavior.

16 Q. So a deterrence?

17 A. A deterrence.

18 Q. A deterrence is certainly a reason for sanctions.

19 Any other benefit?

20 A. Like I said earlier, if you have somebody -- I mean,  
 21 he was bringing up, was it, Charles Manson, and the really  
 22 heinous crimes. There are some crimes that are just --

23 Q. So offensive?

24 A. -- unacceptable they're so offensive that -- that you  
 25 don't want someone like that in society.

1 A. You're glad that they discovered that he was  
 2 innocent.

3 Q. Right.

4 A. There is that relief. Like I said, it's an imperfect  
 5 process and you hope that the jurors do understand or do -- do  
 6 find the guilty plea knowing that it was probable.

7 Q. Okay.

8 A. You hope that they don't make mistakes, but it  
 9 happens. And yeah, it's -- it's nice knowing that --  
 10 especially now with DNA -- that they're able to discover that  
 11 people are innocent and let them out.

12 Q. Do you -- do you agree that there are some  
 13 occupations which demand almost perfection? For example, when  
 14 you get on a plane to fly to Houston, do you expect your pilot  
 15 not to make any mistakes?

16 A. When I walk out my door, I have to accept some level  
 17 of responsibility for accepting the risk of walking out of the  
 18 door. When I go over the bridge, I hope that the engineer did  
 19 a good job building it.

20 Q. Okay.

21 A. I get on a plane, I pray that the pilot had a nice  
 22 night's sleep and that he didn't have an argument with his  
 23 wife.

24 THE COURT: All true.

25 Q. (BY MR. JONES) Or if you ever have to -- so unlucky

1 Q. Okay. So the benefit there would be removal from  
 2 society permanently?

3 A. Correct.

4 Q. But it has to be under that -- that circumstance.

5 You said the crime has to be something that's really --

6 A. Yes.

7 Q. -- offends the social conscious to a high degree.

8 Now, have you read -- it seems like these  
 9 stories are appearing more often lately -- I think *Texas*  
 10 *Monthly* last month had a lead article on these cases where  
 11 people have been found guilty only to be found innocent later  
 12 because of DNA testing?

13 A. Yes.

14 Q. A lot of the cases are coming out of Dallas.

15 Actually, they're occurring all over the United States, and  
 16 many of those cases over the past ten years have actually been  
 17 capital murder cases where people have been sentenced to death,  
 18 okay? Have you ever read a story like that or seen one on TV,  
 19 or --

20 A. I have not -- I've read the headlines.

21 Q. Right. You sort of kind of casually looked at it?

22 A. Yeah.

23 Q. How does it make you feel when you see a story like  
 24 that some guy got 20 years in prison and they finally found out  
 25 he was innocent and they're letting him out?

1 to have to have major surgery, you kind of hope your surgeon  
 2 doesn't make any mistakes, right?

3 A. Correct.

4 Q. Now -- and so you can see while some occupations  
 5 there's a lot of stress on the professional?

6 A. Yes.

7 Q. Every day they're asked to perform without making  
 8 mistakes. But, like you say, they do make them, but they try  
 9 not to. So you're absolutely right that the system is not  
 10 perfect but it is probably the best system in the world. And  
 11 one reason it's the best system in the world is we have set up  
 12 in the criminal side of the -- criminal cases, an elaborate  
 13 appellate system, appeals system, and the purpose of which is  
 14 to correct mistakes. And these appeals can go all the way up  
 15 to the Supreme Court of the United States if the issue is  
 16 right, and that's good.

17 A. Uh-huh.

18 Q. And if mistakes are made, they can be corrected. And  
 19 these men that were released up in Dallas, the writ of habeas  
 20 corpus is a procedural vehicle by which that mistake was  
 21 corrected. Now, the good news for those men is that they were  
 22 alive.

23 A. Correct.

24 Q. See where I'm getting?

25 A. Uh-huh.

1 Q. When you have the death penalty, at some point after  
 2 the appeals system runs its course and there's been political  
 3 pressure on our legislatures to speed up the appellate process  
 4 in death penalty cases, and they have, there comes a point  
 5 where if the sentence is carried out, if it's discovered later  
 6 a mistake was made, like the guy's innocent, then you can't go  
 7 back and correct it, right?

8 A. Correct.

9 Q. Okay. So I'm gonna ask you a question, and listen to  
 10 it carefully. If we accept that, and as you believe, that  
 11 Texas society benefits from the death penalty, are those  
 12 benefits worth the chance of executing an innocent person from  
 13 time to time? You've already answered the question.

14 A. Pardon?

15 Q. You've answered the question.

16 A. Yes, I do believe that. I was kind of wanting to  
 17 expand on it a little bit and --

18 Q. Expand on it.

19 A. -- kind of explain where I'm coming from.

20 Q. Expand on it, please.

21 A. As a Christian -- and, I mean, he's already brought  
 22 up my missionary service --

23 Q. Right.

24 A. -- you can assume that I've got very strong faith,  
 25 very strong stance on certain things. I believe very strongly

1 Christ. So it has to be taken very seriously. I believe that  
 2 I can do that. I don't know what else I can say to explain  
 3 where I am.

4 Q. Well, the other day I asked an old friend of mine, I  
 5 said, "Well, we know for sure that innocent people get  
 6 convicted from time to time, in non-death penalty cases." And  
 7 he said -- well, he said, "What do you want to do, do away with  
 8 criminal cases altogether just because of that chance, because  
 9 we'd have anarchy." And he's right.

10 A. Absolutely.

11 Q. And so when I ask that question to you, I -- you  
 12 paused, and to me, that's an answer because it's a moral  
 13 dilemma we have. However, when you're dealing with death -- as  
 14 one of the Supreme Court justices said, death is different --  
 15 we have to really be careful.

16 A. Absolutely.

17 Q. And I think you've already --

18 A. And that's the point that I'm trying to make is do I  
 19 believe in the death penalty? Absolutely. I believe that, you  
 20 know, you talked about how far the capital murder in our laws  
 21 have gone back and I believe it's all biblically based. So --  
 22 and I think that's one reason why I don't have problems with  
 23 the death penalty as I do believe that there is biblical  
 24 grounds for it, but I also believe that you have to treat it  
 25 with the respect and the diligence that it demands.

1 that we must live under the rules in which we live --

2 Q. Right.

3 A. -- which is the foundation of why we're here. I also  
 4 have a strong belief in that as long as a person is alive, they  
 5 have a chance of accepting Christ and becoming a believer and  
 6 having eternal life. That's my faith.

7 Q. That's your Christian faith.

8 A. And I've had -- when I've talked to people about  
 9 being on a death penalty -- capital murder case, that's the  
 10 discussion, you know, that's what you guys are real concerned  
 11 about, where am I on the death penalty. When a person dies,  
 12 that ends all chances of them becoming a believer and getting  
 13 eternal life. And for me, that's very, very serious and very,  
 14 very important, so I have to weigh that and take that into  
 15 consideration.

16 There's stories of men in prison on death row  
 17 finding Christ becoming a believer. That's important to me to  
 18 know that that work is going on in prisons. Am I very quick  
 19 to -- so I guess what I'm trying to say is, yes, I do believe  
 20 that there is a point for the death penalty, but I also  
 21 believe that it has to be treated with very, very -- the  
 22 utmost respect, and knowing that it is final and that not only  
 23 if you believe that the person is not a believer, not someone  
 24 who has that eternal life. When you sentence them to the  
 25 death penalty, you're sentencing them to a life without

1 Q. All right. You've answered my question. Now, let's  
 2 talk about the mechanics here and understanding of words.  
 3 Reaching the death penalty is a little bit different procedure  
 4 than in non-death penalty case. In a non-death penalty case  
 5 the trial has two phases. The first phase, did the person  
 6 commit the crime he's charged with. If he's found guilty, then  
 7 you go to the second phase of the trial, which deals with  
 8 punishment. And you hear evidence on that issue that you may  
 9 not have heard at the first stage of the trial. Then at the  
 10 end of the evidence, the jury's given a charge and they're  
 11 asked to decide a punishment and they go back and they talk --  
 12 they say the range of punishment is two to ten years and they  
 13 go back and say, okay, we write five years, and they write  
 14 five, maybe they recommend probation, whatever, but they write  
 15 something on the verdict form and make a decision and write it  
 16 directly on a piece of paper and give it to the judge.

17 The death penalty case, that's no juror or the  
 18 foreman of the jury is not ever gonna write the word life or  
 19 death on a piece of paper. I've got a little bit of a problem  
 20 with that, but that's what it is. Instead the Court is going  
 21 to give you two questions, these special issues that Mr. Skurka  
 22 introduced you to. And basically, those special issues set the  
 23 conditions which must be met before the life or death are  
 24 authorized. And those conditions are determined by the  
 25 legislature our law makers who we voted and put in office,

1 okay?

2 So let's -- so basically, there's three  
3 conditions that must be met before a person can get the death  
4 penalty in Texas. What is the first one?

5 A. The first one is here.

6 Q. The first one is he has to be found guilty of the  
7 crime.

8 A. Okay.

9 Q. All right. So once -- if a jury finds a person  
10 guilty of capital murder, the case goes into a second phase.

11 A. Now, may I ask a question?

12 Q. Sure.

13 A. They -- every time they're discussed, they seem to be  
14 linked. The first phase is immaterial if it's capital murder  
15 or murder or robbery or whatever. Is this did he do it or not;  
16 is that correct?

17 Q. The first phase in any kind of criminal case is --

18 A. Guilty or innocence.

19 Q. Did the State prove its case beyond a reasonable  
20 doubt; did he do it?

21 A. Okay. So after that, then it goes to the second  
22 phase --

23 Q. Which deals with --

24 A. -- which deals with life or death.

25 Q. Right. Punishment.

1 instruct you that if this Special Issue No. 1 is answered no,  
2 your deliberations will stop and you'll hand the verdict to the  
3 Court. What punishment will be imposed at that time?

4 A. I have no idea. I'm assuming life.

5 Q. That's right, exactly right. Because that question  
6 has to be answered yes whether the death penalty is authorized.  
7 Since you've answered it no, there's no reason to go forward,  
8 right?

9 A. Correct.

10 Q. All right. Let's say that the jury, however, answers  
11 that question yes. Okay. And I believe from your early --  
12 your answers to Mr. Skurka that you -- I think in your  
13 questionnaire here that the likelihood that a person would  
14 commit criminal acts of violence in the future is an important  
15 consideration for you?

16 A. Yes.

17 Q. And that's one of the reasons for having the death  
18 penalty, I think you said, right? Yes?

19 A. Yes.

20 Q. All right. So let's say the jury has answered that  
21 question yes and then you're told to go to this question. Now,  
22 let's look at that question. It's off to your right here.

23 Would you please read the question to yourself and tell me when  
24 you're finished.

25 A. Okay.

50

52

1 A. Punishment.

2 Q. Okay. Second stage is punishment. And since these  
3 special issues relate to punishment, that's why they're in the  
4 second phase. And you can -- and the -- you can make your  
5 evidence relevant to these issues. Both sides can offer  
6 evidence and argue the evidence. At some point the jury will  
7 ask to be -- will ask -- will be asked to answer those  
8 questions.

9 Okay. So what is the second condition which  
10 must be met before a person can get the death penalty?

11 A. This one, the probability.

12 Q. That he would commit criminal acts of violence in the  
13 future?

14 A. Correct.

15 Q. How many votes of the jury are required to answer  
16 that question yes?

17 A. I have no idea.

18 Q. Twelve, unanimous.

19 A. Okay.

20 Q. All votes against the defendant have to be unanimous.  
21 A. Okay.  
22 Q. The judge will instruct you, however, in this kind of  
23 case there's an exception to the unanimous vote rule. If ten  
24 jurors vote no, the foreman of the jury is authorized to return  
25 the verdict of no. What happens -- oh, and the judge will also

1 Q. Okay. The question asks you to determine if there  
2 are mitigating circumstances that would justify a life sentence  
3 rather than a death sentence, right?

4 A. Uh-huh.

5 Q. But it also asks you to consider certain things?

6 A. Uh-huh.

7 Q. If I ask you to consider something, what am I asking  
8 you to do?

9 A. Consider the circumstances or --

10 Q. To consider means to think about --

11 A. Yeah.

12 Q. -- with a view toward giving effect to, okay?

13 A. Okay.

14 Q. Would you consider this -- and I'm asking you to  
15 consider certain information with a view that you may take some  
16 action, perhaps, that I'm asking?

17 A. Okay. Fair enough.

18 Q. All right. So what does it direct you to do? Now,  
19 keep in mind these considerations the legislature didn't just  
20 think these up by themselves. They're really directed by the  
21 Supreme Court of the United States that have been incorporated  
22 into this issue. Well, the first thing is the circumstances of  
23 the offense. Well, you've already been through that at the  
24 first stage of the trial, right, and you found the person  
25 guilty?

1 A. Okay.

2 Q. And then it says the defendant's character and  
3 background. If I say that you are a person of good character,  
4 what am I saying?

5 A. It's --

6 Q. Let me ask you this. Do you have -- I'm sure you  
7 have many friends, but I'll bet you've got a best friend,  
8 right?

9 A. Uh-huh.

10 Q. Is that person a person of good character?

11 A. Yes.

12 Q. What do you mean by that?

13 A. Trustworthy, high morals, basically has the same  
14 views that I have.

15 Q. Okay.

16 A. Ethics.

17 Q. So character relates to moral values, doesn't it,  
18 ultimately?

19 A. Yeah.

20 Q. And every society has a general set of rules of right  
21 and wrong and we all kind of agree in plight?

22 A. More or less.

23 Q. Yeah. They're set out in the Ten Commandments, the  
24 Boy Scout Law, and those kind of things. And when you say a  
25 person has good character or bad character, it's the degree to

1 A. Absolutely.

2 Q. And their church?

3 A. Actually, no.

4 Q. No. Okay. Where does a child pick up and learn  
5 what's right and what's wrong?

6 A. From parents, from family situations.

7 Q. Are there other sources that could be family? Could  
8 it be school, teachers, church?

9 A. Peers.

10 Q. Peers. Somehow you reach the age of majority and you  
11 hopefully know what to do, right?

12 A. (Nodding head up and down.)

13 Q. So do you agree that parental influence is important  
14 in a young person's life?

15 A. Yes.

16 Q. All right. Let's talk about the next consideration,  
17 personal moral culpability of the defendant. What does that  
18 mean?

19 A. I would say that would be in the defendant's  
20 understanding of where they are morally.

21 Q. Well, let's say --

22 A. Understanding of right and wrong.

23 Q. Okay. This is not easy.

24 A. Uh-huh.

25 Q. It's easy to read the words but to articulate what

1 which he adheres to or deviates from that standard; do you  
2 agree?

3 A. Correct.

4 Q. What about background, what does that mean? That's  
5 pretty simple.

6 A. Upbringing, anything that's happened in the past.

7 Q. Social history?

8 A. Yeah.

9 Q. Now, let's see. I think you've got a couple of kids,  
10 right? They're all grown?

11 A. Uh-huh.

12 Q. And did your kids get to visit Africa?

13 A. Pardon?

14 Q. Did your kids go to Africa?

15 A. Uh-huh.

16 Q. How old were they?

17 A. Three and five.

18 Q. And how long did you stay?

19 A. Nine years.

20 Q. Wow. Well, I'm sure that had a big impact on their  
21 perspective on the world, did it not?

22 A. Yes.

23 Q. So would it be fair to say in your own family, that  
24 your two children, growing up had substantial contact with

25 their parents?

1 they mean is a little more difficult.

2 Let's say you're on the jury, and let's say you  
3 hear evidence that when the defendant was growing up, his --  
4 his father used to beat him and do all kinds of awful things to  
5 him, okay? You know, wouldn't let him go to school and all  
6 kind of terrible things, and you felt like that was  
7 significant. And you felt like that that was a mitigating  
8 circumstance that would justify a life sentence in the  
9 particular case you were hearing. But your fellow juror says,  
10 now, wait a minute, Ms. Light. You know, a lot of people grow  
11 up and their fathers are mean to them, you know, and they don't  
12 go around committing murder. How would you justify your  
13 reasoning that the child's bad upbringing was a mitigating  
14 circumstance?

15 A. I would -- they're absolutely right, not everybody  
16 does. That doesn't diminish the fact that some do.

17 Q. Okay.

18 A. I mean, it's --

19 Q. What's wrong with the fellow juror's statement who  
20 says, "Well, you know, people -- a lot of people grow up in bad  
21 circumstances. That's no excuse." You see, the problem is  
22 when you say, "that's no excuse," that's not the question.  
23 We're not asking you does the mitigating circumstance provide a  
24 defense to the case. You've already found that he's guilty,  
25 you see? We're not asking whether it's a defense. We're

1 asking whether it relates to his personal moral culpability.

2 A. In this initially was asked open-minded and I would  
3 say that this is the part where you have to have the most open  
4 mind.

5 Q. I agree. All right. Let me give you one more  
6 example and then I'm gonna get on to a couple of other things  
7 and we'll be finished.

8 About a year ago there was a case tried in  
9 this courthouse that was a case of the defendant was a lady  
10 who was a professional prostitute, had been since she was a  
11 teenager. And on the -- on the day in question, she lured a  
12 customer to her motel wherever she did her trade, and the  
13 purpose was to rob the customer. And her pimp was in the room  
14 and when the guy resisted, he was -- I think he was either  
15 shot or stabbed, I can't remember. The evidence also showed  
16 in that case that she was not caught right away, but in the  
17 period when she was not, you know, under arrest, she committed  
18 another similar robbery. This time the victim was not  
19 injured. He had just got some money taken, pretty aggravating  
20 circumstances. However -- and she was found guilty fairly  
21 quickly by the jury. However, during the punishment stage of  
22 the trial the defense attorneys were able to prove up that  
23 when this defendant was 12 years old, her mother put her out  
24 as a prostitute. Her mother was her first pimp. So -- and  
25 that fact was argued as a mitigating circumstance to lessen

1 A. Uh-huh.

2 Q. That's just one example. Okay. I think you  
3 understand. In fact, I know you understand.

4 Right to trial by jury is a right to an  
5 impartial jury. An impartial juror is one that comes to the  
6 task with no prejudgments, an open mind, and hopefully, with  
7 no leanings towards one side or the other. A leaning is a  
8 bias. Sitting here right now do you see -- is there any  
9 reason that you know of that we may not have asked you about  
10 that would keep you from being a fair and impartial juror in  
11 this case?

12 A. No.

13 Q. I noticed that you've been the victim of a theft a  
14 while back?

15 A. Yeah. Back in my 20s, my house got burglarized. We  
16 were on vacation. They came in, stole some things.

17 Q. Would that experience transfer to this case?

18 A. No.

19 Q. Okay. You can see -- sometimes I defend from time to  
20 time, a burglary of a habitation, and so when we're picking the  
21 jury I say, "How many people on the jury panel have their had  
22 their houses broken into?" Gosh, half the room raises their  
23 hand so that causes me great stress because I don't want to see  
24 the person on the jury who is so angry about his personal  
25 situation that he's gonna transfer that anger to my client.

1 her moral culpability.

2 Why would that lessen her moral culpability  
3 that her mother put her out as a prostitute?

4 A. As we discussed earlier that parents have a very  
5 strong influence on a child's character.

6 Q. So when you're talking about moral culpability, it  
7 involves -- first of all, you have to ask yourself does the  
8 person know what the rules are, did he have an opportunity to  
9 learn them in the first place. And then, second is, what was  
10 the reason that he deviated from those rules, okay? Like  
11 Mr. Skurka gave you the example of the two burglary cases. One  
12 guy was stealing to feed his starving children. The other guy  
13 was stealing to buy drugs. Okay. Why would -- why would the  
14 person who was stealing to feed his starving children reduce  
15 his moral culpability? Stealing is stealing, burglary is  
16 burglary.

17 A. Honestly, it's probably something you can relate to  
18 as a person being in similar situation.

19 Q. Okay. Well, in that case, was the man stealing for  
20 his children faced with competing moral values? One value says  
21 it's wrong to break into people's homes and steal, and the  
22 other one says that it's wrong to make your kids starve to  
23 death?

24 A. Absolutely.

25 Q. And we can empathize with that, can we not?

1 A. Yeah. It was, like I said, a long time ago.

2 Q. Okay. So it's not gonna affect you?

3 A. No.

4 MR. JONES: Okay. That's it.

5 THE COURT: All right. Mrs. Light, why don't  
6 you wait in the jury room. We'll be right back with you. Let  
7 me speak to the lawyers.

8 VENIREPERSON NO. 65: Thank you for the cough  
9 drop.

10 THE COURT: Oh, you're welcome.

11 MR. SCHIMMEL: Your Honor, the State will  
12 accept this juror.

13 THE COURT: All right.

14 MR. JONES: We will also.

15 THE COURT: All right. Bring her in.

16 MR. JONES: That's No. 8, is it not?

17 THE COURT: That's No. 8.

18 (Venireperson enters courtroom.)

19 THE COURT: All right. Mrs. Light, you have  
20 been selected to be on this jury. I know I've told you  
21 already but let me reiterate the instructions. You know,  
22 you've said you haven't heard anything about this case, and  
23 that's fine. We don't want you watching the local news or  
24 reading the local section of the paper while this case is  
25 going on, because with all due respect with the media, they

1 don't always get it right. We really want you just to  
2 consider what you hear here, okay?

3 JUROR NO. 8: Okay.

4 THE COURT: Two, you can't talk to anybody  
5 about the facts of this case. If someone tries to talk to  
6 you, say no. After the case is over with, maybe, but until  
7 then, no, okay?

8 And we expect this trial to begin December  
9 1st. Be prepared to block off at least that week. The second  
10 week is a possibility. If anything changes, we'll let you  
11 know, but we'll keep in touch with you just to confirm when  
12 it's gonna happen, okay?

13 JUROR NO. 8: Okay.

14 THE COURT: All right. Thank you very much.

15 JUROR NO. 8: Thank you.

16 MR. SKURKA: Thank you, ma'am.

17 (Veniereperson exits courtroom.)

18 THE COURT: All right. That's No. 8.

19 Now, I've got to tell you, there's a couple of  
20 things we need to talk about. One, there's a lady from later  
21 on in the week. I know Ann probably brought that up to you  
22 guys.

23 MR. JONES: Which one?

24 THE COURT: I don't remember what her name is  
25 and I don't know if she's put it here.

1 thinking about that.

2 MR. SKURKA: Well, I think the ones that I  
3 have that are possible ones this morning and I think there are  
4 others --

5 THE COURT: Let me talk to Ann about this.  
6 Maybe you-all can visit for just a second. Let me talk to her  
7 about which juror that is and I'll be right back.

8 (Recess.)

9 THE COURT: All right. Let's get back on the  
10 record. A housekeeping matter, I mentioned that other juror  
11 who I understand I got notes here, and this is Juror No. 144,  
12 Linda Sonneveldt, and I got notes from Mr. Garza and Mr. Skurka  
13 that you would agree to excuse her?

14 MR. GARZA: That is correct, Your Honor.

15 MR. JONES: That is correct.

16 MR. GARZA: 144.

17 MR. SKURKA: That's correct, Your Honor.

18 THE COURT: I know we've gone on a series of  
19 people that, in my opinion, who are very fair and I understand  
20 case in point.

21 MR. JONES: She's almost a perfect juror.

22 THE COURT: I agree. I think she's going to  
23 give this case a good, fair look. But how are we looking this  
24 morning with some of these folks? Do we have any so that I  
25 can -- I mean, I --

62

64

1 MR. JONES: Is there a problem?

2 THE COURT: But we need to talk about maybe  
3 tomorrow.

4 MR. SKURKA: We don't know which one you're  
5 talking about, Judge.

6 THE COURT: Let me ask Ann. She can come  
7 tomorrow, and my point is, we may have to fit her in tomorrow.

8 The second thing is I think we bit way off  
9 than more we can chew here. There's 13 jurors and I did slow  
10 us down by 15 minutes, but we're hitting the 10:00s and we  
11 have an 8, three 8:30s and two 10s and they're all there.

12 THE BAILIFF: No. 64 is here now.

13 MR. SKURKA: I was hoping we had some  
14 agreements on some of the other ones today.

15 THE COURT: But we don't?

16 MR. JONES: We haven't seriously gotten into  
17 it.

18 MR. SKURKA: I think there's four that we can  
19 lose today for one reason or the other.

20 MR. JONES: I think 71 was one of them.

21 MR. SKURKA: Right, 71 is one.

22 THE COURT: I guess my only point is this. If  
23 we need to start calling off afternoon people, most notably,  
24 the 3:00s, it's real easy to do right now and reschedule them  
25 for tomorrow or something. You know, we might want to start

1 MR. SKURKA: We'll agree on 71, Judge.

2 MR. GARZA: That's correct.

3 THE COURT: Okay. Let's bring 71 in there.

4 THE BAILIFF: We still have 60.

5 THE COURT: Yeah, we're gonna excuse this  
6 person. Do we have 71 here?

7 THE BAILIFF: Yes.

8 (Veniereperson enters courtroom.)

9 THE COURT: All right. You are Debra Cotter;  
10 is that right?

11 VENIREPERSON NO. 71: Yes, sir.

12 THE COURT: All right. Ms. Cotter, you're  
13 gonna get out of here quick today.

14 VENIREPERSON NO. 71: Okay.

15 THE COURT: You were not selected to be on  
16 this jury, but we do appreciate your time.

17 VENIREPERSON NO. 71: Okay.

18 THE COURT: If you need a work excuse the  
19 bailiff can do that for you.

20 VENIREPERSON NO. 71: Okay. Thank you.

21 THE COURT: All right. That's that one. Why

22 don't we bring in Linda Hite. She would be an 8:00.

23 THE REPORTER: What number?

24 THE COURT: That would be No. 70.

25 (Veniereperson enters courtroom.)

1 THE COURT: Come forward. You are Linda Hite?

2 VENIREPERSON NO. 70: Yes, sir.

3

4 VENIREPERSON NO. 70,

5 LINDA M. HITE,

6 VOIR DIRE EXAMINATION

7 BY THE COURT:

8 Q. All right. Let's see here. All right. Here's the  
9 situation. I think you know we're looking to pick a capital  
10 murder jury and we're looking for open-minded people.

11 A. Okay.

12 Q. Some people aren't because maybe they've heard  
13 something in the media and for maybe just for whatever reason  
14 they're not open-minded and you agree it would be unfair to get  
15 somebody on the jury like that?

16 A. Right.

17 Q. And it's okay if you're not, but if you are  
18 open-minded, that's also okay, but we do need to know. Can you  
19 keep an open mind?

20 A. Yes.

21 Q. Okay. All right. That's one. Two, we're looking  
22 for people that can follow the law. Let's see here. We're  
23 gonna see if that is you. You have never been a juror before?

24 A. No, sir.

25 Q. That's okay. No prior experience necessary, okay?

1 would you vote. Now, some jurors say, well, I couldn't vote  
2 because I haven't heard anything.

3 A. Right.

4 Q. And then others -- really, the right answer to that  
5 is he's not guilty.

6 A. Right.

7 Q. Because you haven't heard anything, okay? The fact  
8 of the matter is we never -- we would never ask a juror to do  
9 that. That's a -- that's a nonsensical question. But what we  
10 would ask a juror to do is wait till after the State's put on  
11 their evidence and then make a determination and sometimes  
12 State's evidence isn't any good, okay? And if you don't find  
13 the -- that -- if you find that they haven't proven their case,  
14 would you -- could you still presume him to be innocent until  
15 they prove it?

16 A. Yes.

17 Q. Okay. Now, as part of that, the burden in this case  
18 is high. It's beyond a reasonable doubt. You've probably  
19 heard that, you may remember that from government class and you  
20 may remember that from, I don't know, maybe you're a -- you're  
21 a buff. It's the highest burden that we have in all of the law  
22 and it's their burden, okay? And it's -- what it is, is  
23 sometimes it's easier to explain what it isn't to tell you what  
24 it is. In civil law, we have a burden of proof. In most civil  
25 cases it's preponderance of the evidence is like just ever so

1 Now, I want to talk about some things. The  
2 law says this. The law says -- it's a criminal case. The law  
3 says, State of Texas, you brought the charges, okay?

4 A. Okay.

5 Q. You brought the charges, State of Texas, you've got  
6 to prove your case, all right?

7 A. Okay.

8 Q. You think that's fair?

9 A. Yes.

10 Q. Okay. And as part of that, the defendant doesn't  
11 have to prove anything, okay? The defense side has no burden,  
12 all right?

13 A. Right.

14 Q. They brought it, you prove it. And as part of that,  
15 the defendant is presumed to be innocent.

16 A. Right.

17 Q. And the law says, look, you brought the charges,  
18 State, that's fine if you can prove it. But until you do,  
19 until you bring evidence to the people of this community that  
20 proves beyond a reasonable doubt -- we'll talk about that in a  
21 minute -- that this defendant is guilty of the crime and he did  
22 it, you could follow that?

23 A. Yes.

24 Q. And we have -- on jury selection we do somewhat of a  
25 silly example, but that is, if you had to vote right now, how

1 slightly.

2 A. Okay.

3 Q. All right. Let's say there's a car accident or let's  
4 say there's a dispute between companies over a contract and the  
5 plaintiff brings the case saying the other side violated.  
6 Well, it would be their burden of proof, but it would be ever  
7 so slight.

8 A. Okay.

9 Q. Okay? Then there's also a higher burden called clear  
10 and convincing evidence, okay? Clear and convincing evidence  
11 is pretty self-explanatory. That's clear and convincing. That  
12 sounds pretty strong, okay? But that -- that's the burden in  
13 some civil cases, and most notably, when the State seeks to  
14 terminate the parental rights of a parent over a child, okay?  
15 Because maybe the State believes they have been a bad parent,  
16 all right? So they have to prove by clear and convincing to  
17 the people.

18 A. Okay.

19 Q. All right. This is even higher. This is beyond a  
20 reasonable doubt. It's higher than clear and convincing.

21 Now, also what it's not, it's not beyond all  
22 doubt. It's not beyond a shadow of a doubt. There's a key  
23 word in that and that's reasonable doubt, beyond a reasonable  
24 doubt. Okay. That kind of gives you an idea of what it's not  
25 to tell you what it is, all right?

1 A. Uh-huh.

2 Q. Now, they have to prove that. As part of these  
 3 concepts I've already covered, the law says since the defendant  
 4 has no burden of proof and the burden never shifts over here,  
 5 they don't have to present any evidence. They being the  
 6 defendant. They don't have to put on testimony. The State  
 7 certainly does. If the State -- if we go to trial and the  
 8 State puts on no evidence, they don't prevail. But on the  
 9 defense side, they don't have to present evidence. They can  
 10 present no evidence and still prevail because the jury may  
 11 think the State hasn't proven their case. And as part of that,  
 12 the law says -- it's more than the law, it's the U. S.  
 13 Constitution says, defendant doesn't have to testify, okay?  
 14 And I believe there's a lot of reasons why that would be so.  
 15 Perhaps his lawyers say, "You know what, we're advising you not  
 16 to testify because we don't think they've proven their case."  
 17 Or perhaps -- I like to give the example, I had a friend who  
 18 laughed inappropriately when he got nervous, okay? And people  
 19 would get offended by it and he didn't mean anything by it. He  
 20 was nervous, okay? Some people aren't meant -- they're not  
 21 good speakers.

22 A. Right.

23 Q. And the jury may take it wrong and maybe, in their  
 24 opinion, the defense opinion, they tell him, "I don't think you  
 25 should testify because you're not -- some people are good

1 capital murder? Well, the capital part means the death  
 2 penalty is a possibility. And what I just said is important  
 3 because it's possibility. There's two possible outcomes if a  
 4 defendant is found guilty of capital murder and there's other  
 5 ways to prove it, but in this case, that's the allegation,  
 6 okay? Life in prison or the death penalty. Those are the  
 7 only two things that can happen.

8 Now, a murder case -- in a murder case, there  
 9 is a punishment range, all right? It's five years to 99 years  
 10 or life, and sometimes probation is a possibility, okay? But  
 11 here we have life or death.

12 Now, criminal cases in Texas have to two  
 13 parts. They have the guilt or innocence phase. We go to  
 14 trial, the jury deliberates on whether the State's proven  
 15 their case and they return a verdict. And then there's the  
 16 punishment phase. What does the defendant get as the  
 17 punishment if he's found guilty? If the defendant is found  
 18 not guilty, the case is over with. Are you with me?

19 A. . Uh-huh.

20 Q. All right. Now, let's assume this was a murder case.  
 21 If this was just a murder case -- and I don't know any other  
 22 way to say it but just plain murder as opposed to capital  
 23 murder. If the defendant is found guilty at the first stage,  
 24 you go to the punishment phase. If jury is asked to assess  
 25 punishment, the jury goes through and they look at the

70 1 communicators, others are not."

2 A. Right.

3 Q. But the law says, in any event, not only can the  
 4 State call the defendant, not only does he have a right not to  
 5 testify, but you can't hold it against him. In other words,  
 6 you can't go back to the jury room and say, "Okay, let's weigh  
 7 this. Let's see, State's evidence, Defendant. Oh, he didn't  
 8 testify. Okay, that helps the State." You can't do that.  
 9 Could you follow that law and not hold it against him?

10 A. Yes.

11 Q. All right. Very good. Now, what kind of case is  
 12 this? Well, it's a capital murder. What does that mean?  
 13 Murder is in capital murder so we know it's at least murder,  
 14 right? Murder is intentional taking of a life of another.  
 15 Capital murder is I like to call murder plus. The legislature  
 16 has laid out a list of things that make capital murder. So you  
 17 got murder, which is the intentional taking of the life, and  
 18 then you have capital murder, special circumstances murder plus  
 19 something else. In this case, State is alleging that the  
 20 defendant committed murder while in the course of committing or  
 21 attempting to commit a robbery, okay? So it's all -- two  
 22 serious felonies put together. And the legislature says, all  
 23 right, if you can prove these two serious felonies at the same  
 24 time, then we -- we -- that's capital murder.

25 All right. And what is the significance of

72 1 background of the defendant, maybe, his criminal history, and  
 2 the facts of the case, all right? And they come up with a  
 3 number. It may be -- it may be ten years, maybe 50 years,  
 4 maybe even probation, if ten years or less is a possibility and  
 5 certain circumstances exist. They can assess a fine. That's  
 6 how that works. Capital is different. Yes, we do have the  
 7 guilt or innocence phase. The jury would deliberate as to  
 8 whether a defendant is guilty beyond a reasonable doubt of  
 9 capital murder. There's a lot of elements to that because you  
 10 have two crimes, okay? They've got to prove them all.

11 Would you hold them to that burden to prove  
 12 all the elements of the capital murder?

13 A. Uh-huh.

14 Q. Yes?

15 A. Yes.

16 Q. That's that. Okay. If we get to the second phase,  
 17 one would think, because of the example that I gave you about  
 18 murder that you had you'd say, the jury would go back and  
 19 deliberate and write in the little line life or death. But it  
 20 doesn't work like that, okay? We answer questions. And here's  
 21 the first one.

22 At punishment, the jury would answer this  
 23 question. "Is there a probability that the defendant would  
 24 commit criminal acts of violence that would constitute a  
 25 continuing threat to society?" Is he probably gonna be violent

1 to people in the future? Okay. That's basically what that is.  
 2 A. Okay.  
 3 Q. We call at the future dangerousness. The jury would  
 4 answer yes or no. If you don't think he's gonna be violent to  
 5 people in the future, then you'd answer no. But if the jury  
 6 believes that, then they answer yes. Then they go on to the  
 7 second question. Special Issue No. 2. "After taking into  
 8 consideration all of the evidence, including the circumstances  
 9 of the offense" -- that's the first part of the trial -- "the  
 10 defendant's character and background, and the personal moral  
 11 culpability of defendant, is there a sufficient mitigating  
 12 circumstance or circumstances to warrant a sentence of life  
 13 imprisonment rather than the death sentence be imposed?" Okay.  
 14 Now, what does this mean? Well, this is more of a global  
 15 question in a way. It's like taking into consideration  
 16 everything you hear in this case, the first part of the case  
 17 and the second part. At the second part you might hear all  
 18 kinds of things. You might hear the defendant's got a bad  
 19 criminal history. You might hear he's got no criminal history.  
 20 You might hear he's a great guy. You might hear he's not a  
 21 great guy. And you may hear a bunch of things about his past,  
 22 you know, what was he like as a child, how did he grow up,  
 23 because you've got, you know, background there. We talk about  
 24 his character, his personal moral culpability, okay? And so  
 25 you hear everything.

74

1 Now, you see that word -- there's a word  
 2 "mitigating circumstance" or "circumstances," all right? What  
 3 is that? Well, that's for the jury to decide. Maybe the  
 4 jurors may think, I don't know, he was an Eagle Scout. That  
 5 may be a mitigating circumstance. Maybe he did work in the  
 6 community. You know, really other than that day, he was a  
 7 great guy. You know, he did community service. He taught  
 8 children to read, okay? These are all possible mitigating  
 9 circumstances. And these lawyers will try and tell you what  
 10 they believe a mitigating circumstance in this case or an  
 11 aggravating circumstance in this case may be. But only the  
 12 jury gets to decide what that actually is. And so then the  
 13 jury decides whether there are sufficient mitigating  
 14 circumstances, because the jury may say, you know what, I do  
 15 think that's a mitigating circumstance that he was an Eagle  
 16 Scout. And the question becomes is there -- is that  
 17 sufficient? Is all of the mitigating circumstances that the  
 18 jury, you know, comes up with, are they sufficient to warrant  
 19 life rather than death? Because you might find that there are  
 20 mitigating circumstances, but it may not be sufficient to  
 21 warrant life or death taking the entire case as a whole,  
 22 everything that you hear, okay? You follow me?

23 A. Uh-huh.

24 Q. All right. And then, of course, you know, his  
 25 character. What's that? Well, what kind of guy is he, is he a

1 moral guy, is he not a moral guy? Is he ethical, is he not  
 2 ethical, okay? His personal moral culpability. That can be  
 3 looked at several different ways, but, you know, what's his  
 4 ethical background like. It's kind of a funny way of putting  
 5 it. If you found him guilty, but how guilty is he, okay? All  
 6 right. You'd answer those two questions and you'd answer that  
 7 yes or no just like this one.

8 At the beginning of every trial, I raise my  
 9 right hand, the jurors raise their right hand and I say, "Do  
 10 you solemnly swear you can render a true verdict based on the  
 11 law and the evidence given to you?" And then the jury says,  
 12 "Yes." I need to ask you -- and we're gonna break it down in  
 13 parts -- could you take that oath to render a true verdict,  
 14 based upon the evidence and law presented to you, on the guilt  
 15 or innocence phase?

16 A. Yes.

17 Q. Okay. Let's get to the second part. This gets a  
 18 little trickier for some people, okay?

19 A. Okay.

20 Q. Some people tell me, "Look, I can do that on the  
 21 guilt or innocence. I can determine whether the State's proven  
 22 their case beyond a reasonable doubt that he's guilty of  
 23 capital murder. What I cannot do is participate in the second  
 24 part because it may lead to someone's death, and I cannot do  
 25 that for whatever reason." Some people tell me, "Likewise, I

76

1 can give them a fair trial on the guilt or innocence phase, but  
 2 when we get here to these special issues, if we get there, I  
 3 don't care about your law. I'm gonna figure out a way to  
 4 vote -- I'm not gonna consider any of this. This is nonsense  
 5 to me. I'm only -- I'm gonna figure out a way to vote so that  
 6 he gets the death penalty, because if he gets found guilty of  
 7 capital murder, that's death for me every time." All right.  
 8 Neither of those people can take the oath because they would  
 9 not answer these questions truthfully, all right? They  
 10 wouldn't consider them properly. I need to know if you can  
 11 take that oath.

12 A. Yes.

13 Q. And give these questions the consideration that they  
 14 deserve?

15 A. Yes.

16 THE COURT: Okay. All right. Well, I'll turn  
 17 you over to Mr. Skurka.

18 MR. SKURKA: Thank you, Judge.

19 VOIR DIRE EXAMINATION

20 BY MR. SKURKA:

21 Q. Good morning, Mrs. Hite. How are you today?

22 A. Fine.

23 Q. We're gonna talk about some things here in a few  
 24 minutes and I want to tell you there are no right or wrong  
 25 answers to anything we talk about. I'll be the assistant DA

1 presenting the case along with Geordie Schimmel. And we don't  
 2 want you answering the questions the way you think the judge  
 3 wants to hear it or we want to hear it, or the defense wants to  
 4 hear it. We just want to hear your views on certain things.

5 A. Right.

6 Q. Would you do me a favor and move that microphone a  
 7 little closer to you. It's kind of in my way and maybe I can  
 8 hear your voice a little better. You have kind of a soft  
 9 voice, okay?

10 A. Tell my husband that.

11 (Laughter.)

12 Q. (BY MR. SKURKA) Well, maybe they say in the courtroom  
 13 you have a soft voice. At home, it's a different matter. I  
 14 know, my wife tells me the same thing. She goes, "You're using  
 15 your courtroom voice," and I go, "Well, sorry."

16 Tell me about being on this type of jury. Tell  
 17 me about how you felt when the judge said that this is a  
 18 capital murder case. Remember that day when there's two or 300  
 19 people in there and nobody knew what they were called for the  
 20 till the judge says, "This is a criminal case and that  
 21 defendant right there may be facing death penalty." Tell me  
 22 what your first reaction was when you first heard that.

23 A. It was kind of -- I don't know. I guess, you know,  
 24 maybe my heart kind of stopped a minute, because it would be a  
 25 big -- it's a big responsibility. You're kind of holding

1 A. No, sir.

2 Q. -- when you lived somewhere else?

3 A. It was when I lived in Florida.

4 Q. Okay. Sometimes people think -- and you said you  
 5 were born and raised a Catholic, correct?

6 A. Yes, sir.

7 Q. I'm the same way and I understand that the Catholic  
 8 church has never -- are you aware of any kind of, I don't know  
 9 if they call it catechism or doctrine, where they just come out  
 10 and say -- I mean, like abortion, for example, you know it  
 11 says, we're against abortion?

12 A. Right.

13 Q. But have you ever heard the Pope or some kind of  
 14 edict coming out of the Catholic church from Rome that says the  
 15 Catholic church is against the death penalty?

16 A. We do teach that, yes, the Catholic church is against  
 17 the death penalty.

18 Q. I mean, based on what? What I'm saying is --

19 A. I honestly don't know if it is in the catechism.

20 Q. See, that's what I was thinking?

21 A. That would be something interesting since my husband  
 22 and I do teach RCIA.

23 Q. Oh, you teach RCIA?

24 A. Yes, sir. That is something I would have to look up.

25 Q. For the record, RCIA is where you're converting into

78

1 somebody else's life in your hands, and you know, so I just

2 kind of had to, you know, took a deep breath and thought a  
 3 minute.

4 Q. What did you think?

5 A. I think, like I answered on my questionnaire being,  
 6 you know, born and raised a Catholic, I was always taught God  
 7 is the only one that has the right to take a life. And I  
 8 always thought that I would dread if I would ever get to this  
 9 point. And we had a pastor one time and he -- he said he was  
 10 taught in the seminary that if someone knowingly takes a life  
 11 that they have lost all right to their life. Looking at it  
 12 that way, I could -- if evidence proved it, I could vote for  
 13 the death penalty.

14 Q. Tell me about this. How did that conversation with  
 15 your priest come up? Was that like in --

16 A. It was in a homily.

17 Q. -- a sermon, a homily or was it like a one on one  
 18 thing?

19 A. No, it was in a homily.

20 Q. And how long ago was that?

21 A. About five years.

22 Q. Okay. I was just wondering if it was something that  
 23 like happened recently or something?

24 A. Oh, no. It was about five years ago.

25 Q. Was that here in Corpus or --

80

1 Catholicism --

2 A. Correct.

3 Q. -- and you teach a class. I was just trying to help  
 4 the other folks out who may not be Catholic.

5 A. Right.

6 Q. Just on the record.

7 A. Right.

8 Q. And I don't want to -- it's kind of a debate I've had  
 9 with certain people that say -- they say, "Well, the Catholic

10 church is against it." And I go, "Well, where is that written?  
 11 Where is that said?" You know, you get these ecumenical edicts  
 12 coming out of the Vatican so often, but I've never just seen  
 13 that.

14 A. Honestly, I can't say that I have either.

15 Q. Is it something you kind of assume they're against  
 16 it?

17 A. I think, well, you know, if we're against abortion,  
 18 which is killing a life --

19 Q. Sure.

20 A. -- then it only stands to reason that you would be  
 21 against capital punishment

22 Q. Would you agree with me, though, there's a difference  
 23 between abortion and capital punishment?

24 A. Yes, most definitely.

25 Q. Yeah, sure. That's what I've always tried to pin

1 people down, and I haven't talked to a priest about that. I'm  
 2 always curious when people say they're against the death  
 3 penalty because I think Catholics are like a lot of other  
 4 religions where you still have to obey the law of the land, you  
 5 know?

6 A. Exactly.

7 Q. And the law is pretty clear, you don't kill people.

8 A. Right.

9 Q. And even though you Catholics don't want to take  
 10 lives just like anybody else, they see that it may be necessary  
 11 in some circumstances.

12 A. Uh-huh.

13 Q. Have you worried about this for a long time -- not  
 14 worried, that's not the right word. But you've always kind of  
 15 assumed in your life as a Catholic that they were against it  
 16 and it's only when this priest said for the first time --

17 A. Exactly.

18 Q. -- that that changed you?

19 A. Right. Well, it made a little more sense. I think  
 20 always before then, I had just thought that there wasn't any --  
 21 you know, you didn't think about what happened that the murder  
 22 was committed. It was just you cannot -- you don't take a  
 23 life.

24 Q. Sure.

25 A. You don't take -- you know, it says, an eye for an

1 A. Right.

2 Q. And they know that this person may resist at this  
 3 store. I mean, those are two different examples, right?

4 A. Right, right.

5 Q. Because if you went without a weapon it's kind of  
 6 unforeseen --

7 A. Right.

8 Q. -- that somebody's gonna die. But if you go in there  
 9 with a knife or a gun, you can't say, "Hey, I didn't know  
 10 anybody was gonna get hurt."

11 A. Right.

12 Q. I mean, it's not like you're going in there and  
 13 you're gonna go forge a check and somebody's gonna get hurt.  
 14 You know nobody's gonna get hurt when you're forging a check.  
 15 But when you go in there with a weapon, you can see that's  
 16 foreseeable.

17 A. Uh-huh.

18 Q. That's a big word the law uses. Is it a foreseeable,  
 19 inevitable thing that could possibly happen. You can't just  
 20 say, "Well, I didn't know anybody was gonna get hurt," and  
 21 you're packing a gun or a knife.

22 A. Right.

23 Q. Tell me about -- you seemed pretty strong in the  
 24 Catholic faith because of what you do. Is there gonna be any  
 25 kind of lingering thing in the back of your mind because of

82

84

1 eye so.

2 Q. Right.

3 A. But I said after he had said that, it -- it made a  
 4 little bit more sense.

5 Q. So essentially, what they're saying is, you're not  
 6 supposed to take a life, but if there's a reason for it, like a  
 7 law or a process in doing it, because when you said that if you  
 8 take a life, you lose all your rights?

9 A. What he said if you knowingly take a life -- and I  
 10 guess what I -- what my mind is thinking, if someone committed  
 11 a -- was going to commit a robbery and their thought process  
 12 was, "I will do whatever it takes to get what I'm after," then  
 13 you're saying, you knowingly took the life. If that was not --  
 14 which, you know, what happened, and say you -- I don't know,  
 15 you robbed a store or something, and somebody came in behind  
 16 you. Your intent was not to kill, but it just happened, then,  
 17 to me, that's different.

18 Q. And let me tell you, the law says it's kind of that  
 19 way too. Let me give you a couple of examples. Say a person  
 20 has gone into the store, a convenience store, to steal a candy  
 21 bar, and that's all they wanted to do was steal a candy bar.  
 22 They have no weapons on them, they have nothing on them. All  
 23 they want to do is shoplift a candy bar. Okay. Change the  
 24 scenario around and somebody says they're gonna go steal  
 25 something from the store but they have a gun on them.

1 that making that kind of decision because you said -- and I  
 2 agree with you, it's an awesome responsibility. How do you,  
 3 Linda Hite, feel about sitting on a jury having to make that  
 4 decision? And do you feel whether you can or cannot make that  
 5 decision?

6 A. I could make the decision. If all evidence was  
 7 provided, proven that the murder was committed -- I mean, that  
 8 the murder was committed because, you know, they had the intent  
 9 that they were gonna get whatever and the murder happened, I  
 10 could live with myself. If that was not proven, no, I could  
 11 not.

12 Q. So you're saying if the killing was kind of  
 13 incidental --

14 A. Like you said, if a robbery was committed and, you  
 15 know, the weapon was not there, if they pick up something and  
 16 beat them over the head and it kills them, they -- you know,  
 17 the intention was not there that they hadn't -- you know, were  
 18 going to kill somebody. But you're packing a gun, you go into  
 19 rob someplace, your intent is you're gonna get what you want --

20 Q. Whatever --

21 A. -- regardless.

22 Q. The law in Texas -- you always hear this on TV,  
 23 pre-meditated murder. Premeditated. You've heard of that,  
 24 right?

25 A. Right.

1 Q. Have you ever heard the judge ever say premeditated  
2 here?

3 A. No.

4 Q. And you know why? We don't have that requirement  
5 premeditated. Premeditated to me means you planned it out.

6 A. You thought about it.

7 Q. You thought about it. You've spent some time  
8 dwelling on it, how you're gonna do it. In the law, we don't  
9 have that. What we have is do you have the intent to do it.  
10 That intent can be formed in three days, in three hours, in  
11 three minutes, in three seconds. You can go into like -- we'll  
12 just use that same story -- into a convenience store and you  
13 didn't really intend to kill somebody. But say you go in there  
14 and you rob them and you're leaving. All you wanted to do was  
15 rob them. So you're robbing them and you're walking out the  
16 door and then you realize, hey, wait a minute, I left a witness  
17 alive, that guy could testify against me, and so you go back  
18 and kill the guy. When you first went in the store you didn't  
19 intend, you didn't premeditate and think you're gonna kill  
20 somebody, but it kind of arose at the time. And the law says  
21 that's intentional murder because whether you planned it or  
22 not, you did do it, and you had the intent to kill somebody,  
23 because it may have been, you know, a split second decision or  
24 walking out going, "Oh, my gosh, that's a witness, who can  
25 testify against me." See what I'm saying --

1 Q. But from my perspective --

2 A. I understand.

3 Q. I mean, I've told you-all the very first day that our  
4 office has decided to seek the death penalty.

5 A. Right, right.

6 Q. And we're not talking about somebody you see on TV or  
7 read about in the newspaper. That's him. Can you look at the  
8 young man with me?

9 A. Right.

10 Q. That's John Henry Ramirez, not somebody else. That's  
11 him. I want to know if you, Linda Hite, if you think the  
12 evidence is there, can you look at him and vote in such a way  
13 after the evidence is heard, that if you think the evidence is  
14 there, that you could vote for death penalty?

15 A. Yes.

16 Q. And no hesitation there?

17 A. No.

18 Q. Okay. And I have to ask you the other way, if you  
19 think you can -- he should get a life sentence, can you do  
20 that?

21 A. Yes.

22 Q. Do you know how Texas does the death penalty?

23 A. No.

24 Q. They do lethal injection.

25 A. Okay.

1 A. Right.

2 Q. -- that could be the intent.

3 Going back to the religious aspect though -- and  
4 again, I'm not trying to pin you down. I just want to kind of  
5 know where you're coming from because everybody has a right to  
6 their decision. We've had people here on the jury that come in  
7 and they say, "Hey, Mark, you know, I believe in the death  
8 penalty, it's a good law. I think Texas should have it and  
9 it's a good law to have on the books and it deters criminals.  
10 I'm for the death penalty. But, Mark, don't make me sit on a  
11 jury and make that decision. I can't do it. I believe it but  
12 I can't do it."

13 Tell me how you feel about that, how that fits  
14 in your character or your decision making and whichever way  
15 you say is fine.

16 A. No, I -- I mean, it's not something that you're  
17 jumping up and down with joy, I'm gonna be on a jury. But at  
18 the same point in time, knowing myself, I would want someone  
19 like me to sit on the jury because I'm gonna take it a little  
20 bit -- not that others are gonna take it less seriously, but I  
21 think I'm gonna look at the evidence a little bit harder to see  
22 that that was proved, that the intent was there.

23 Q. So -- and I agree with you, not everybody's jumping  
24 for joy for doing this.

25 A. Right.

1 Q. Basically, what that means is a person, on the day  
2 they're supposed to be executed, the guards come in and get him  
3 and they take him down there and they kind of have a last meal,  
4 then they walk down this hallway to this special unit where  
5 they put him in this room, and the room has a gurney on it like  
6 a hospital bed thing, and they have some, I guess, rubber tubes  
7 or hoses that lead through a window to the other thing, so the  
8 person injects them, doesn't just go stick a needle in his arm.  
9 They have these tubes that kind of go in an IV and they feed  
10 him these poisons, or not poisons, medicines, that actually  
11 kill him. And that's what's gonna happen to this man that's  
12 smiling over there. He can be led down that hall strapped down  
13 to a gurney --

14 MR. GARZA: Your Honor, I'm gonna object to  
15 that comment made in front of this juror about him smiling.

16 THE COURT: Sustained.

17 MR. GARZA: And I'm gonna object to the  
18 pointing of the -- of what's gonna happen to him. He's  
19 already making a presupposition that he's proven the case to  
20 this juror, Your Honor.

21 THE COURT: Sustained.

22 MR. GARZA: That's a --

23 THE COURT: Sustained. I mean, look, here's  
24 the deal --

25 MR. GARZA: Can we excuse the juror, Judge? I

1 would like to take a motion up in front of the Court and  
2 outside the presence of the jury?

3 THE COURT: Okay.

4 MR. SKURKA: What do you need to do that for,  
5 Judge, if the objection's sustained?

6 THE COURT: Well, I'll let you do that. If  
7 you could just give us --

8 MR. GARZA: Well, let me just ask this, Judge.  
9 Can ask the juror to disregard that comment?

10 THE COURT: I will. I will.

11 VENIREPERSON NO. 70: Sure.

12 THE COURT: I mean, the fact of the matter is  
13 -- and I like the answer that you gave a little while ago. I  
14 appreciate the fact that you're taking this seriously, I  
15 really do, because while a good number of people do, some  
16 people do not.

17 VENIREPERSON NO. 70: Right.

18 THE COURT: And this is a serious, serious  
19 situation, and we all -- and, of course, nobody in here is  
20 laughing. You know, we're all taking this very seriously. I  
21 would instruct you to disregard those comments. He is not  
22 guilty at this time until the State can prove it, if they can.

23 VENIREPERSON NO. 70: Right.

24 THE COURT: We don't know if they can.

25 VENIREPERSON NO. 70: Right.

1 do." But I'm just kind of curious if that would affect you  
2 then being on this jury? And again, whatever answer you say is  
3 fine.

4 A. No, I really don't think so. You know, it's -- gosh,  
5 it's hard. I don't think so, because like I said, it always  
6 before I was like, no, I could never do that. But after, you  
7 know, like I say, Father Marty's homily, and he was somebody I  
8 really liked, I mean, as far as priest goes, so, no, I think I  
9 could still go on.

10 Q. Even if the priest said that it was not --

11 A. Right.

12 Q. -- that it was against their policy?

13 A. Right. A life was taken. I mean, I don't know  
14 whether it was intentionally or not but it's still happened  
15 regardless of what the church says or does not say, so I could  
16 still go on.

17 Q. And that's my bottom line. Is your feelings with the  
18 church or the church's policies gonna interfere with you  
19 serving on a jury?

20 A. No.

21 MR. SKURKA: Okay. Thank you, ma'am. That's  
22 all the questions I have. Thank you, Your Honor.

23 THE COURT: All right. Mr. Garza.

24 MR. GARZA: Thank you, ma'am. I mean, thank  
25 you, Judge.

1 THE COURT: So there is no presupposition that  
2 he is going to be found guilty.

3 VENIREPERSON NO. 70: Right.

4 THE COURT: And that -- that --

5 VENIREPERSON NO. 70: It's like the example  
6 you gave. I mean, I don't know what's going through his mind.  
7 It may have been nervousness, again, like you said.

8 THE COURT: Well, that's true. Some people --  
9 I had a friend, boy, he would laugh inappropriately. People  
10 would get angry with him and he wouldn't mean any harm. It's  
11 just the way he was.

12 VENIREPERSON NO. 70: Right.

13 THE COURT: All right, Mr. Garza?

14 MR. GARZA: Thank you, Your Honor.

15 THE COURT: All right. You may proceed,  
16 Mr. Skurka.

17 MR. SKURKA: Thank you, Judge.

18 Q. (BY MR. SKURKA) What would happen if you went to  
19 church Sunday before you started jury service and you had a  
20 different priest, and for some reason that homily talked about  
21 the death penalty and that priest says, "I just came back from  
22 a seminar meeting with the Bishop and the other Cardinals or  
23 whatever, and you know, it's gonna come out in the church that  
24 the church is gonna take an official position that we're  
25 against the death penalty, and I don't know what they're gonna

1 VOIR DIRE EXAMINATION

2 BY MR. GARZA:

3 Q. Ms. Hite, I'm Ed Garza as I introduced myself  
4 probably back when the whole group came down and we had you-all  
5 fill out these questionnaires and gave you some general  
6 concepts of the law.

7 In Texas, our rules require that whenever a  
8 person is charged with a crime, and if they so ask for a jury  
9 trial, that the jury be fair and impartial.

10 A. Right.

11 THE COURT: I think we need to take a little  
12 break. I need to take a little break. Can you wait in the  
13 jury room?

14 VENIREPERSON NO. 70: Sure.

15 THE COURT: All right.

16 MR. SKURKA: Judge, the State will exercise a  
17 peremptory strike.

18 THE COURT: Okay. That would be your strike  
19 No. 3. All right. Let's bring her back in.

20 (Venireperson enters courtroom.)

21 THE COURT: All right. Ms. Hite, we really  
22 appreciate you coming down here but you are not selected to be  
23 on this jury, but we do appreciate your time and attention of  
24 this case. Thank you very much.

25 VENIREPERSON NO. 70: Thank you.

1                   THE COURT: If you need a work excuse, we can  
 2 get that for you.

3                   VENIREPERSON NO. 70: No, I'm good. Thank  
 4 you.

5                   THE COURT: Thank you.

6                   (Venireperson exits courtroom.)

7                   MR. SKURKA: I was trying to get your  
 8 attention.

9                   MR. GARZA: That's okay.

10                  THE COURT: I appreciate that. I mean, if  
  11 you're gonna strike her, there's no point in us spending a  
  12 bunch of time if you're gonna strike her anyway.

13                  Okay. We have David Kocian, bring him in.  
 14 This is Juror No. 64.

15                  (Venireperson enters courtroom.)

16                  THE COURT: All right. You are David Kocian,  
 17 is that right?

18                  VENIREPERSON NO. 64: Kocian, uh-huh.

19                  VENIREPERSON NO. 64,  
 20                  DAVID CHARLES KOCIAN,  
 21                  VOIR DIRE EXAMINATION

22                  BY THE COURT:

23                  Q. Mr. Kocian, we called you off on Friday, and I'm  
 24 sorry about that, but at least you didn't have to come all the

1                  A. Right.

2                  Q. Obviously, there are countries in the world where  
 3 that's the case and defendant has to prove his innocence. I  
 4 think that would be a sad place to live, quite frankly. We  
 5 don't do that here. The law says, you bring them, you prove  
 6 them. Do you agree with that law?

7                  A. I do.

8                  Q. Okay. The law also says that the burden is proof  
 9 beyond a reasonable doubt. There's no definition. But what I  
 10 like to do with jurors is sort of explain what's not, and that  
 11 gives us an idea of what it is, all right?

12                 A. Okay.

13                 Q. Civil case. Let's say this was a civil case. Let's  
 14 say Company A sues Company B over a contract, all right?  
 15 Company A would be the plaintiff. They're bringing the case.  
 16 They would have the burden of proving that Company B violated  
 17 the contract, all right?

18                 A. All right.

19                 Q. But it's pretty much a pretty small burden. It's  
 20 just tipping the scales ever so slightly. Some people call it  
 21 51 percent. It's kind of like probably, all right? More  
 22 likely than not, but nothing else, all right?

23                 A. All right.

24                 Q. A higher burden than that is clear and convincing  
 25 evidence and that's got -- that in and of itself sounds -- you

1 way down here.

2                 A. I was pulling into the parking lot at the time, but  
 3 that's okay.

4                 Q. I'm sorry. Okay. All right. Well, you obviously  
 5 know we're trying to pick a capital murder jury at this time?

6                 A. Correct.

7                 Q. Okay. And we are looking for people that can be fair  
 8 and impartial, and most notably, we're looking for people that  
 9 can keep an open mind, okay? And some people can't, and that's  
 10 okay, but it's really not okay. It's not fair to the parties  
 11 if you can't, okay?

12                 A. Right.

13                 Q. My first question is, can you keep an open mind about  
 14 this case?

15                 A. Yes.

16                 Q. Okay. Next, we're looking for people that can follow  
 17 the law, and we're gonna talk to you about that, all right?

18                 Now, let's see. You've never been on a jury  
 19 before. That's okay. No prior jury service necessary to sit  
 20 on this jury. But we do need to talk about some concepts.

21                 First of all, this being a criminal case, the  
 22 State has brought charges, okay? The law says, "State, you  
 23 bring charges, that's fine, but you've got to prove them, all  
 24 right?" You don't just get to -- you don't just get to say  
 25 defendant is guilty and it's so.

1 know, it kind of tells you what it is, clear and convincing,  
 2 all right? That's a higher burden than the 51 percent thing.  
 3 And that's the kind of burden that we use in some civil cases,  
 4 most notably, where the State is attempting to remove children  
 5 from what the State believes are bad parents, all right? They  
 6 have to prove to the people of the jury by clear and convincing  
 7 evidence, okay? This is higher than that. This is beyond a  
 8 reasonable doubt, okay? What it is not also is it's not beyond  
 9 a shadow of a doubt, it's not beyond all doubt. It's beyond a  
 10 reasonable doubt. And I think the most important word in that  
 11 phrase is reasonable, beyond a reasonable doubt. A high  
 12 burden, but not beyond all doubt. Do you follow me?

13                 A. Yes, sir.

14                 Q. Okay. Could you hold the State to that burden?

15                 A. Yes, I could.

16                 Q. Okay. Now, as part of all of this, the law says,  
 17 okay, State, you've brought charges, that's fine, you've got to  
 18 prove them. And until you do, defendant is innocent until if  
 19 you can prove the charges, okay?

20                 A. Correct.

21                 Q. You presume him to be innocent until they can prove  
 22 otherwise, if they can, okay? Ancient concept goes back to the  
 23 Roman and the Greeks.

24                 A. Right.

25                 Q. All right. Could you do that? Could you --

1 A. Yes, I could.

2 Q. All right. And we give an example around here that's  
3 not a real world example, but the example is, if you had to  
4 vote right now, how would you vote? Well, the answer's not  
5 guilty because they haven't proven anything.

6 A. Right.

7 Q. In a more real world situation we would begin the  
8 trial and the State would present their evidence, and what  
9 would happen if they could not prove to you beyond a reasonable  
10 doubt the defendant's guilt?

11 A. It would be not guilty.

12 Q. Because they didn't get there?

13 A. Correct.

14 Q. Okay. Now, as part of that, the law, the  
15 Constitution of the United States says defendant does not have  
16 to do anything, and he does not even have to testify.

17 A. Right.

18 Q. Okay. His lawyers may advise him not to testify.  
19 Maybe he's not a good speaker, maybe he's uneducated. There's  
20 lots of reasons. But the fact of the matter is, State can't  
21 call him as a witness, and if he doesn't want to testify, he  
22 doesn't have to.

23 A. Right.

24 Q. Now, some people say, "Well, you know, I've got to  
25 hear both sides of the story." It just doesn't work like that,

1 which murder is a capital murder. In this particular case, the  
2 State is alleging that it's murder while in the course of  
3 committing or attempting to commit a robbery, okay? What's  
4 robbery? Well, robbery is the forcible taking of something  
5 from another person or the threat to do so, okay? If I went up  
6 to you and I, you know, pulled a gun on you and said, "Give me  
7 your wallet," and you gave me your wallet, well, that would be  
8 a robbery, right?

9 A. Correct.

10 Q. Okay. If I went up to you and I had that same gun,  
11 and I said, "Give me your wallet," and you were a martial arts  
12 expert and you punched me in the face and knocked me out, it  
13 wouldn't necessarily be robbery, but it would be an attempted  
14 robbery. Do you follow me?

15 A. Correct.

16 Q. Okay. The State can get there either way on a  
17 robbery or attempted robbery, okay? But what the law says is  
18 this. The legislature says this, "If you've got the murder  
19 plus the robbery or attempted robbery, that is, the murder  
20 happens in the course of committing or attempting to commit the  
21 robbery or attempted robbery, then you've got capital murder."  
22 There's a laundry list of things that they have to prove, the  
23 elements, that is. They've got to prove all of murder, they've  
24 got to prove the robbery or attempted robbery. They've got to  
25 prove that he was the one that was the perpetrator, and they

1 okay? This is not both sides of the story. This is not a race  
2 to the finish line. The defendant is not running himself.  
3 This is a race that the State is trying to win. The State is  
4 trying to cross the line of reasonable doubt. And if they  
5 can't do it, they don't get there, okay?

6 The law says, "Jury, not only does he not have  
7 to testify, but you can't go back there and hold it against  
8 him." You can't go in that jury room and deliberate and say,  
9 "Okay, here's the State's stuff. Now, defense didn't testify.  
10 Okay. We're gonna give State some more points." You can't do  
11 that.

12 A. Right.

13 Q. Would you follow that law and not hold it against the  
14 defendant if he chose not to testify?

15 A. Yes, I would.

16 Q. Okay. Now, let's talk a little bit about this case  
17 and what this case -- what the allegations are about.

18 The allegation is capital murder. All right.  
19 The defendant's charged with capital murder. What is capital  
20 murder? Well, murder is within capital murder so it's  
21 obviously murder, okay? And what is murder? Murder is the  
22 intentional taking of the life of another. But it's capital  
23 murder, so what does that mean? Well, I like to call it murder  
24 plus, murder plus something else. All right. And there's a  
25 laundry list that the legislature has given us instances in

1 got to prove in Nueces County, Texas, and they've got to prove  
2 the on or about the date, okay?

3 A. Right.

4 Q. Would you hold the State to that and make them prove  
5 all their elements?

6 A. Yes, I would.

7 Q. Okay. All right. Now, what makes capital murder  
8 significant? Well, the capital part means that the death  
9 penalty's a possibility. Now, in Texas, we have a bifurcated  
10 system. What does that mean? Well, that means there's two  
11 parts. There's the first part which is guilt or innocence.  
12 The State will try to prove to the jury beyond a reasonable  
13 doubt of the defendant's guilt. And if they do, then we go on  
14 to the punishment phase. If they don't, the case is over with.  
15 The jury says not guilty, game over. If the jury says, guilty,  
16 we go to the second part and that's the punishment phase.

17 Now, the punishment phase -- let's say this  
18 was a murder case, it would work exactly the same way in the  
19 guilt or innocence phase. If defendant's found guilty of  
20 murder, then the jury would go in the jury room and then  
21 there's a range of punishment, five to 99 years or life, up to  
22 a \$10,000 fine. Probation is an option, in certain  
23 situations, okay? And then the jury would come up with a  
24 punishment.

25 We don't do it that way in capital murder. In

1 capital murder, there's only two possibilities; one is life in  
 2 prison and the other is death. But you don't go back there  
 3 and write life in the little blank or death in the little  
 4 blank. It doesn't work like that. You answer questions.  
 5 Here's the first one, it's over here over your left shoulder.

6 "Is there a possibility that the defendant  
 7 would commit criminal acts of violence that would constitute a  
 8 continuing threat to society?" Well, what does that mean?  
 9 Well, would the defendant probably be violent with people in  
 10 the future? Is he gonna be a violent person to people in the  
 11 future and the jury would answer yes or no. Is that probably  
 12 true, okay?

13 Then the jury would go to the second question  
 14 that's over your right shoulder. Now, this to me, is sort of  
 15 a global question. "After taking into consideration all of  
 16 the evidence, including the circumstances of the offense" --  
 17 that's the first part of the trial -- "the defendant's  
 18 character, and background, and the personal moral culpability  
 19 of the defendant, is there a sufficient mitigating  
 20 circumstance or circumstances that warrant a sentence of life  
 21 imprisonment rather than a death sentence be imposed?" All  
 22 right. What does that mean? Well, second half of the trial  
 23 -- first half all you're gonna hear about is, you know, the  
 24 allegation, and Mr. Skurka's gonna try to put on evidence to  
 25 show that the defendant was guilty of the crime. The second

1 circumstance only the jury gets to decide, okay? That is,  
 2 let's say it is presented that the defendant was an Eagle  
 3 Scout. Maybe one of the jurors will say, "You know what, that  
 4 is a mitigating circumstance. I'll consider that." Another  
 5 juror says, "No, that's not a mitigating circumstance to me,"  
 6 okay? And the question then becomes, have enough sufficient --  
 7 have enough mitigating circumstances been presented to you in  
 8 the trial to warrant life rather than death if we get to this  
 9 point, okay? Do you follow me?

10 A. Yes, sir.

11 Q. In other words, you might think, "Hey, you know what,  
 12 he did community service, you know, he used to teach kids to  
 13 read. And that is a mitigating factor and I am gonna consider  
 14 it." And you may think it is sufficient that combined with the  
 15 other mitigating factors or mitigating circumstances that are  
 16 presented to you, you may think, it is sufficient. Or you may  
 17 say, "Yes, that's a mitigating circumstance, but it's not  
 18 enough to warrant life rather than death," and the jury would  
 19 answer this question yes or no, okay?

20 A. Yes, sir.

21 Q. Okay. Next thing, at the beginning of the trial, I  
 22 always -- I always raise my right hand, the jurors raise their  
 23 right hand, and I swear them in and the oath goes like this.

24 "Do you solemnly swear that you will render a  
 25 true verdict based upon the law and evidence presented to you

1 part of the trial you hear a lot of other stuff, I suspect. I  
 2 don't know. But I suspect you're gonna hear more things like,  
 3 did he have a criminal history, did he not. Is he -- has he  
 4 been a good guy other than this day, has he been a bad guy  
 5 other than this day, you know. And those are -- those are all  
 6 -- you need to consider all of those things in answering those  
 7 questions, okay? So we've got the circumstances of the  
 8 offense, we have the defendant's character. You know, what  
 9 kind of guy is he? Is he a good guy, all right? Was this --  
 10 was this crime an aberration, was this crime just completely  
 11 out of his character, his background? What -- how did he grow  
 12 up, you know? What kind of -- what kind of background did he  
 13 have? Did he have loving parents, did he have parents that  
 14 were horrible? That kind of thing, okay? His personal moral  
 15 culpability. What is -- what was his -- what was the basis  
 16 behind him forming his moral values? How did his parents  
 17 bring him up, okay? How guilty is he? Now, we know he's  
 18 guilty, but how really guilty is he of this crime, okay? Are  
 19 you following me?

20 A. Yes, sir.

21 Q. And you've got to consider all of those things. Now,  
 22 once you consider all of those things, then is there sufficient  
 23 mitigating circumstance or circumstances? What is a mitigating  
 24 circumstance? Well, these lawyers will try and tell you what  
 25 they think the mitigating circumstance is, but a mitigating

1 in this trial?" And they say yes. I need to know if you can  
 2 take that oath and let's break it up. Can you, on the guilt or  
 3 innocence phase, render a true verdict based upon the law and  
 4 evidence as presented to you?

5 A. Yes, I can.

6 Q. Okay. Let's go to the second phase. If defendant's  
 7 found guilty by the jury, you know, I have to ask the same  
 8 question. And some people tell me, I could do the first part,  
 9 but I can't do the second because I cannot participate in any  
 10 process that may lead to someone's death. And then some people  
 11 tell me, I'll give him a fair trial, but if he gets convicted,  
 12 these special issues mean nothing to me. I will not consider  
 13 all of these things. I will answer the questions in such a way  
 14 that the defendant will get the death penalty without  
 15 considering any of this. And really, neither of those --  
 16 neither of those people are following the law and neither of  
 17 those people can take the oath, and it's okay for them to feel  
 18 that way. It's just unfair to put somebody on a jury that  
 19 won't follow the law.

20 A. That's true.

21 Q. Okay. So I need to know from you, can you take that  
 22 oath and follow the law?

23 A. Yes, I can.

24 THE COURT: All right. Mr. Skurka.

25 MR. SKURKA: Thank you, Judge.

## 1 VOIR DIRE EXAMINATION

2 BY MR. SKURKA:

3 Q. Hi, Mr. Kocian, I'm Mark Skurka, I'm first assistant  
 4 DA along with Geordie Schimmel who had to step out for a  
 5 minute. We'll be the ones presenting the case to you. I want  
 6 to start off by telling you there are no right or wrong answers  
 7 to anything you say. We just need to know how you feel about  
 8 some of the laws and the issues in this case. I don't want you  
 9 to answer in such a way that you think, well, I better say it  
 10 this way because the judge wants me to say it that way or I  
 11 want you to say it that way, or the defense wants you to say it  
 12 that way. We just want to know what your true feelings are so  
 13 we can make a decision and help the judge make a decision  
 14 whether you qualify or not?

15 A. Okay.

16 Q. Fair enough?

17 A. Fair enough.

18 Q. I told you-all the very first day the State is  
 19 seeking the death penalty in this case. Do you remember you're  
 20 in that big room with all those people?

21 A. Uh-huh.

22 Q. And the judge came out and said, "This is a capital  
 23 murder case, folks. This person could be facing the death  
 24 penalty." How did you feel about that when you first heard it  
 25 was that kind of case? What was the first reaction you had?

106

108

1 A. I actually didn't have a reaction. I was just  
 2 listening to exactly what you had said. I don't know anything  
 3 about the case so it's – I believe if a person has done a  
 4 crime, he needs to do the time, and so, I really didn't have a  
 5 reaction to what you said.

6 Q. The reason I ask is because I was watching some of  
 7 the jurors.

8 A. Right.

9 Q. And there was kind of a ripple through the crowd, so  
 10 to speak, when they heard, some said, "Oh, my gosh, I may have  
 11 to be having to make that kind of decision." Some people were  
 12 going like, "Oh, my gosh." And then some people were maybe  
 13 like you that, you know, sat up a little straighter, listened a  
 14 little closer, "Hey, this is serious stuff, I better pay  
 15 attention." Is that kind of how you felt?

16 A. Yes, I did.

17 Q. And it doesn't matter how you feel. And those people  
 18 that have a reaction it's because they think that they can't  
 19 serve on that type of case. They come in here thinking they're  
 20 gonna do, you know, a DWI case or shoplifting case.

21 A. Right.

22 Q. And they find out, boom, they got the biggest one.

23 A. Right.

24 Q. But that didn't bother you or make you hesitate or  
 25 anything?

1 A. No, sir.

2 Q. Okay. Nobody wants to do this. You know, I can tell  
 3 you pretty much nobody – none of our jurors are claiming like,  
 4 "Hey, pick me, pick me," and it's not a happy thing to do or  
 5 make decisions. But put yourself in my perspective, in my  
 6 side. I want somebody that's actually gonna go through with it  
 7 if the evidence calls for that. Can you be that kind of juror,  
 8 if the evidence proves that he should get the death penalty,  
 9 can you vote for it?

10 A. Yes, I can.

11 Q. Do you see what I'm saying? I need people that can  
 12 kind of not just talk the talk, but walk the walk. Because we  
 13 have people that say, "Hey, Mark, I believe in the death  
 14 penalty, it's a good law, we should have it in Texas. I fully  
 15 support it." And then I say, "Well, okay, then you're gonna  
 16 sit on a jury." And they go, "Wait a minute, I don't want to  
 17 be the one that actually does it."

18 A. That's right.

19 Q. You see what I'm saying? But you wouldn't have any  
 20 reservations or holding back on that because of any personal  
 21 feelings or anything?

22 A. No, sir.

23 Q. It sounds to me what you're saying is the law is the  
 24 law?

25 A. That's right.

106

108

1 Q. And if a person commits the crime you said he does  
 2 the time. The only thing I have to caution you about there is  
 3 certainly nothing automatic in the courtroom.

4 A. That's right.

5 Q. Just because he's here, does that mean he's guilty?

6 A. No, it does not.

7 Q. Just because he's found guilty of capital murder,  
 8 does that mean he automatically gets the death sentence?

9 A. No, it does not.

10 Q. That's right. It means, there's two choices, death  
 11 or life in prison. There's a presumption in the law that says  
 12 a person is presumed innocent. The State has to prove he's  
 13 guilty beyond a reasonable doubt. Whether that's him, you,  
 14 anybody sitting out there, the State has to prove him guilty  
 15 beyond a reasonable doubt.

16 Now, the presumption of innocence means that  
 17 he's presumed innocent at this time. It doesn't mean that he's  
 18 necessarily is innocent. He's got to start with innocence and  
 19 then we have to prove him guilty. You see what I'm saying?

20 A. Yes, sir.

21 Q. Sometimes jurors – the lawyers ask a question like  
 22 well, right now, "If you had to vote, how would you vote?" And  
 23 they go, "Well, I don't know, I don't have enough information  
 24 to vote." And really, you have to vote innocent because you  
 25 have heard nothing.

1 A. That's right.

2 Q. Can you have that in your mind that he's presumed  
3 innocent at this time?

4 A. Yes, sir.

5 Q. And, you know, I don't mean to sound corny, but you  
6 know, that's America. In other countries, I've heard that, you  
7 know, you're guilty and then you have to prove you're  
8 innocence.

9 A. That's right.

10 Q. But that's not the way we work here. Another thing  
11 we have here is the Fifth Amendment right. Just because you're  
12 accused of a crime, does that mean you can be forced to testify  
13 against yourself?

14 A. No, you can't.

15 Q. Heck, no. The law says, no, that's kind of the  
16 cornerstone of our foundation. Sometimes jurors say, "But I  
17 want to hear both sides. I want to hear both sides, Judge, and  
18 I can't make a decision unless I hear from him. I want to hear  
19 what he said, because if I was charged, I'd want to hear."  
20 Well, I'd want to be able to say it and that's not the law.  
21 The law says you can testify if you want to, but if you don't  
22 want to, you don't have to. And, more importantly, the jury  
23 can't hold it against him. Do you believe that?

24 A. Yes, I do.

25 Q. I think the judge made an example. Sometimes people

1 A. I didn't know exactly what distinguished a murder  
2 trial from a capital murder trial until you-all had told me  
3 about it.

4 Q. And that's understandable because a lot of people  
5 don't understand. They think every murder case is eligible for  
6 the death penalty, and I have to tell them no. The legislature  
7 has said only those really more serious murder cases, as I  
8 think the judge said life -- I'm sorry, murder plus something  
9 else, killing a policeman on duty, you know, killing a kid  
10 under six, murder for hire, serial murders, or murder while  
11 you're raping, robbing, kidnapping or burglarizing somebody.

12 A. Yes.

13 Q. In other words, it can't -- I hate to say plain or  
14 run of the mill murder. It's got to be something a little  
15 extra. So people say, "Well, you know, I'm for the death  
16 penalty." You understand the State's already carves out just  
17 very few cases that can get the death penalty? Not every  
18 murder can get it. And I guess -- well, I'm not gonna tell you  
19 why the legislature thinks that, but I think the point is if  
20 you're gonna have a capital murder case, it better be a very  
21 serious case.

22 A. Yes, sir.

23 Q. And just because you're charged with it doesn't mean  
24 you're necessarily gonna get it or you're gonna get the death  
25 penalty because there's another option, life in prison.

1 don't testify well because they're nervous in public speaking  
2 or whatever?

3 A. That's right.

4 Q. Whatever it is. And I don't -- I can't tell you if  
5 he's gonna testify or not. That's up to him and his lawyer,  
6 but I can tell you if he doesn't testify the judge is gonna  
7 tell you under the law, you can't hold that against him. Can  
8 you follow that part of the law?

9 A. Yes, I can.

10 Q. Okay. One of the things about, you know, doing the  
11 crime and doing the time is that there's such a range. Like if  
12 you're on a regular say burglary case, in a burglary case, the  
13 range of punishment is generally two years to 20 years in  
14 prison.

15 A. Right.

16 Q. And the range is that wide because some jurors -- I'm  
17 sorry, some cases fit at the top, some fit at the bottom?

18 A. Right.

19 Q. And in this kind of a case it's a little different in  
20 that you have two choices. You don't just pick out death or  
21 life in prison. You have to listen to the evidence and make a  
22 decision. And the reason, of course, this is capital murder,  
23 is because not every murder is eligible for the death penalty.  
24 Did you know that before you came in last -- a couple of weeks  
25 ago?

1 So the reason we have it here is because we're  
2 alleging that Mr. Ramirez killed somebody or murdered somebody  
3 while in the course of committing robbery, in the course of  
4 committing robbery or attempting to commit robbery. In other  
5 words, it doesn't even have to be a successful robbery,  
6 completed robbery. As long as you try to take something by  
7 force, or with threats of force, that's a robbery.

8 Say a guy goes in a bank and points a gun on a  
9 bank teller and says, "Give me all your money," and the bank  
10 teller gives them the money and then they start walking out of  
11 the bank and they get caught right before they go out on the  
12 street. Well, can he go up there and say, "Well, I'm not  
13 guilty. I didn't finish the robbery, you know, I didn't get  
14 away with it." No. What if he's right there at the teller  
15 and says, "Give me all your money," and the teller, you know,  
16 pushes the secret button, and before she even hands over the  
17 money, the security guards grabbed the guy. And he says,  
18 "Well, wait a minute, I'm not guilty, I never got any money  
19 from that." It doesn't matter. That would be silly. And the  
20 law doesn't require that. It just says while in the course of  
21 committing robbery or attempting to commit robbery.

22 And there's two parts of the trial. The first  
23 part is guilt or innocence, and the second part is the  
24 punishment. And we keep those separate because, number one,  
25 you should make a decision on whether he did it or not before

1 you're even thinking about how to punish him, because if he  
 2 didn't do it, you're not gonna punish him. So there's two  
 3 parts of the trial first, the first part guilt or innocence.

4 Generally speaking, you only hear evidence  
 5 about what happened that day, you know, did he do the crime,  
 6 did he not do the crime. And you might hear some surrounding  
 7 circumstances about, you know, right before the crime, right  
 8 after the crime, and during the crime, that kind of stuff, but  
 9 generally, that's all you hear.

10 The second part of the trial, though, you  
 11 might get to hear the background of the person. In other  
 12 words, you probably want to hear the background before you  
 13 decide how bad the punishment should be, if it should be death  
 14 or life.

15 Now, the law also says, guess what, you can  
 16 make the decision based on just the crime itself. If it's so  
 17 heinous, so horrible, you can make the decision based on that.  
 18 There's no requirement that you have to be -- what do they  
 19 call those things -- two strikes you're out or three time  
 20 losers. There's no requirement of that. All it says is you  
 21 can consider the evidence at the first part and the second  
 22 part. And the second part of the trial you might get to hear  
 23 about stuff. You might get to hear, oh, he came from a broken  
 24 home, or, you know, his mother was an alcoholic, or you know,  
 25 he had -- he had trouble in school. Or you may hear the

1 to prove that. It just says is it probable.

2 The law also says, it says, "Would commit  
 3 criminal acts of violence." Some people tell me, "Well, I  
 4 thought I could only vote for the death penalty if I think  
 5 he's gonna murder somebody again or commit another capital  
 6 murder." And I tell them, "That's not what the law says. It  
 7 just says commit criminal acts of violence. It could be  
 8 almost anything."

9 Then the last part says, "continuing threat to  
 10 society." You probably heard that before, continuing threat  
 11 to society. What does that mean to you?

12 A. It means that if the man is not gonna -- that he's  
 13 gonna continue to threaten people, rob or steal, whatever that  
 14 that he is into, continue not to become a citizen of the states  
 15 and abide by their laws.

16 Q. Okay. That's exactly right. The thing I need to  
 17 caution you about is sometimes people say this. "Well, you're  
 18 saying he's gonna be a continuing threat to society." But,  
 19 hey, remember you've got another choice, life sentence. You  
 20 could just lock him in prison for life in prison and he can't  
 21 hurt anybody. He won't hurt anybody if you lock him in prison.  
 22 And I always say, "Well, have you ever heard about prisoners  
 23 hurting other prisoners or hurting guards or something?" It  
 24 sounds a little funny, but prison is still part of society,  
 25 isn't it?

1 opposite. You may hear he's a good guy, that he made straight  
 2 As in school, or that he was an Eagle Scout, you know. See  
 3 what I'm saying?

4 A. Right.

5 Q. I'm kind of tricking you to say wait till you hear  
 6 the evidence before you make the decision?

7 A. Exactly.

8 Q. And when you make the decision it's not just checking  
 9 off, I vote for death, I vote for life. What you do is you  
 10 answer some questions based on everything you hear. And the  
 11 questions the judge went over them with you. I'm gonna go over  
 12 them in a little more detail and ask you to look at number one  
 13 with me.

14 It says -- this is presupposing the person's  
 15 been found guilty, okay, and you've heard the evidence on the  
 16 second part of the trial. The judge then says, "Answer this  
 17 question. Is there a probability that the defendant would  
 18 commit criminal acts of violence that would constitute a  
 19 continuing threat to society?" We call that the future  
 20 dangerousness question. In essence, do you think he's gonna  
 21 be a danger in the future? The question or the point I want  
 22 to make to you is look at some of those words up there. It  
 23 says, "Is there a probability?" It doesn't say there's a  
 24 certainty because unless you got a crystal ball you can't tell  
 25 what's gonna happen in the future. The law doesn't require me

1 A. Yes, sir.

2 Q. Because you're interacting with other human beings?

3 A. Yes, sir.

4 Q. I mean, it would be different if we had like a desert  
 5 island. You put them on a desert island and they have no  
 6 contact with other humans, then for sure you can say, "I'm not  
 7 gonna hurt anybody." But would you agree with me that prison  
 8 is part of society and you could still be a threat to society?

9 A. Yes, sir.

10 Q. Even if you're in prison?

11 A. Yes, you can.

12 Q. It's kind of weird thinking about prison being part  
 13 of society, but it really is because if you decide society, you  
 14 know, intermixing with other people and having contact with  
 15 human beings. Because there's guards there, there's prisoners  
 16 there, there's workers at the prison, that kind of stuff.

17 Okay. Based on the evidence, you answer that  
 18 question yes or no, do you think he's gonna be a continuing  
 19 threat to society and could possibly commit other crimes? If  
 20 you answer that question yes, you go to the second question.  
 21 The second question is what we call mitigating circumstances  
 22 question. Mitigating is a word that basically means to lessen  
 23 or make less severe. I'm walking a little slow because my back  
 24 hurts today. I threw out my back this weekend. I don't always  
 25 walk that way. It just looks a little funny today.

1 Mitigating circumstance is the key word.  
 2 Mitigating means anything that would listen or make less severe  
 3 or anything that reduces the defendant's moral blameworthiness.  
 4 It sounds like some lawyer wrote that up, right?

5 A. Yeah.

6 Q. And probably did.

7 A. Yeah.

8 Q. I like to tell people it's kind of like the opposite  
 9 of aggravating circumstances. It's not something that makes it  
 10 worse. It's something that you can consider to give them a  
 11 lower sentence. You got a couple of kids, right?

12 A. Yes, I do.

13 Q. Don't you, when you say you have to punish your kids,  
 14 don't you look at the whole picture first and their background  
 15 before they make a decision? I'm gonna give you a deal because  
 16 I'm sure your kids never did this. But say you have two kids  
 17 and they're both accused of violating curfew. And in the  
 18 curfew violation, the first kid comes in and your curfew's at  
 19 11:00. The first kid comes in at 11:03. You start hammering  
 20 them and saying, "You're missing curfew. What's going on, you  
 21 missed curfew?" The first kid says, "Well, dad, yeah, I missed  
 22 curfew, I'm three minutes late. And the reason I'm three  
 23 minutes late is because I had a flat tire and I would have been  
 24 home at 10:45 but because of the flat tire it took me about 20  
 25 minutes to change it and so that's what it makes me late." And

1 Q. But you see, those things about only three minutes  
 2 late, never been breaking curfew before, and the fact he had a  
 3 flat tire kind of had a reason for it, that's mitigating  
 4 circumstances. That's kind of what that question is designed  
 5 for. You think he's guilty of capital murder, you think he's a  
 6 continuing threat to society. But wait. The judge says,  
 7 "Before you vote for the death penalty, take into consideration  
 8 all of the evidence, including the circumstances of the  
 9 offense, you know, what happened that day, how bad was the  
 10 crime, his character and background. Is it good character and  
 11 background, is it bad character and background, and the  
 12 personal moral culpability of the defendant. Is there a  
 13 sufficient mitigating circumstance?" And it also has got to be  
 14 enough. It's got to be enough of a mitigating circumstances to  
 15 warrant that a sentence of life rather than death sentence be  
 16 imposed. In other words, are there these extenuating  
 17 circumstances that means that I should lower the punishment?  
 18 He's still guilty of the crime, but it goes back to death or  
 19 life in prison.

20 A. Right.

21 Q. Some of those circumstances are aggravating, some may  
 22 be mitigating. But the point the judge is going to tell you is  
 23 you have to consider everything before you make your mind up.  
 24 Like if I had started you off by saying, your two kids broke  
 25 curfew, you'd think, oh, that's bad, I'm gonna punish them.

118

1 then you look back and you say, "Well, you know, in all this  
 2 time he's had 11:00 curfew, this is the first time he's ever  
 3 missed curfew." So you may have to punish him because, you  
 4 know, he did miss curfew, but you're gonna probably listen to  
 5 all those other circumstances.

6 Now, look at your second kid, and for lack of a  
 7 better word, this is your bad kid. The bad kid comes in and he  
 8 doesn't come in at a little after 11. He comes in at 3:00 in  
 9 the morning, misses curfew by four hours. And then you ask  
 10 him, "Son, you know, what happened? Why are you so late?" And  
 11 he says, "Well, we were at a party and we just forgot about the  
 12 time, I forgot I had to be home at 11, and I don't really have  
 13 any excuse. I was just partying with my friends and stuff."  
 14 And then you – and then you talk to him and you realize, this  
 15 isn't the first time he's broken curfew. This is like the  
 16 fifth time this year that he's broken curfew. And he didn't  
 17 miss it, you know, by three minutes. He missed it by four  
 18 hours. Now, you look at them both and they're both equally  
 19 guilty of breaking curfew, right?

20 A. Uh-huh.

21 Q. But are you really gonna punish them the same?

22 A. No, you're not.

23 Q. Why not?

24 A. One has disregard for your laws, if put it that way,  
 25 yes.

120

1 I'm gonna ground them each for a week. But then you find out  
 2 the circumstances are different. It's kind of a trick question  
 3 because you have to wait till you hear everything, and that's  
 4 all the judge is gonna say. Can you do that?

5 A. Yes, I can.

6 Q. And it makes sense, right?

7 A. Yes, it does.

8 Q. Because right now he's presumed innocent?

9 A. Right.

10 Q. You don't know if he did it, you don't know what his  
 11 background is. But the judge is gonna say, "Keep an open mind  
 12 until you hear everything."

13 A. Right.

14 Q. If there is enough to lower the sentence, is it  
 15 enough mitigating circumstance to lower it, lower it. If you  
 16 think there's not, you don't have to. The key is this: The  
 17 judge doesn't tell you what a mitigating circumstance is. It's  
 18 up to the folks on the jury. You know, some jurors may say,  
 19 "Well, you know, he was an Eagle Scout in school, he was on  
 20 honor roll, you know, he was a war hero, helped little old  
 21 ladies across the street, whatever it is. Because of that, I'm  
 22 gonna lower the sentence and give him life." Other people say,  
 23 "Look, you know, I don't care if he was on the honor roll. He  
 24 still did for this crime and he's got to pay for this crime."

25 Do you see what I'm saying?

1 A. Right, exactly.

2 Q. But you don't close your mind to these things until  
3 you hear everything.

4 A. Right.

5 Q. And then if you hear it, is there enough? That's up  
6 to the jury to decide if it's enough to outweigh. It's kind of  
7 a balancing test.

8 One other thing the judge may say on the law is  
9 voluntary intoxication is not a defense to crime. Voluntary  
10 intoxication. If you go get yourself drunk or high on drugs,  
11 is that an excuse to crime? No, absolutely not. The law does  
12 say it's a possible mitigating circumstance, but that's one of  
13 those things again. Some people may say, "Well, he robbed that  
14 bank but he was drunk when he robbed the bank so I'm gonna give  
15 him a break." Other people may say, "I don't care if he was  
16 drunk or not, he still robbed the bank and he's got to pay for  
17 that." Do you see what I'm saying?

18 A. Exactly.

19 Q. Whatever effect it is you have to decide if it's  
20 enough to lower the sentence --

21 A. Right.

22 Q. -- okay? Does that make sense?

23 A. Yes, sir.

24 Q. It's kind of a fair scheme, isn't it?

25 A. Yes, I believe it is.

1 A. It would be on the evidence, yes.

2 Q. It has to be on the evidence.

3 Now, a couple of legal things we need to talk  
4 about again are just because he's indicted for capital murder,  
5 does that mean he's guilty of capital murder?

6 A. No.

7 Q. The indictment is just a way the charges are brought  
8 against him. That doesn't mean that he's necessarily guilty.  
9 It just means that we're charging. As the judge said, we have  
10 to prove the case. And the State has to prove the case beyond  
11 a reasonable doubt. That doesn't mean beyond all doubt or  
12 shadow of a doubt or any doubt. People are always saying on TV  
13 – and it drives me nuts. They say, "Well, you have to prove  
14 it beyond a shadow of a doubt." This judge is not gonna tell  
15 you that. And the definition he's gonna give just basically  
16 means it's not all doubt, beyond any doubt, or anything like  
17 that. And we've already talked, I think, about the presumption  
18 of innocence. As he sits here now he's presumed innocent. And  
19 the Fifth Amendment. He can testify if he wants to. If he  
20 doesn't want to, he doesn't have to, and you can't hold that  
21 against him.

22 I'm trying to think if I have any other  
23 questions. Oh, you understand too that police officers are to  
24 be treated like anybody else on the stand? Sometimes people  
25 say, well, he's a policeman, I have to believe everything he

1 Q. You're not gonna rush into anything with the stuff.  
2 The judge directs you to these questions, "Is he a continuing  
3 threat to society and is there anything that should make him  
4 get a lesser sentence?" Because I think most of the jurors  
5 said it's an awesome responsibility. You don't want to run  
6 headlong into something. You want to be able to make a  
7 decision. And you think you can make that decision, if called  
8 upon?

9 A. Yes, I do.

10 Q. Would you agree with me, it doesn't really matter  
11 what a person looks like? What really matters is what they  
12 did.

13 A. That's true. That's true.

14 Q. Because I'll tell you, sometimes people came into the  
15 jury room that day and saw this young man sitting there and  
16 they're thinking like, "Oh, my gosh, you know, he's so young,  
17 he doesn't look that bad." And I always say, "Well, can you --  
18 you're not supposed to judge a book by its cover," right?

19 A. That's right.

20 Q. I've been practicing criminal law for 22 years and  
21 juries always think it's gonna be like Charles Manson sitting  
22 in there looking real bad and it's really never that way. Or  
23 those big biker looking scary dude. But would you agree with  
24 me you need to make a decision on what they did, not what they  
25 look like?

1 says. The law gives policeman no better rights of credibility,  
2 you know. It's like if there's a priest or a nun on the stand,  
3 they're still treated like anybody else?

4 A. That's right.

5 Q. Can you do that?

6 A. Yes, I can.

7 MR. SKURKA: I don't think I have any other  
8 questions of Mr. Kocian. I appreciate you talking to me. The  
9 other lawyer is going to want to talk to you now.

10 MR. GARZA: May I proceed, Your Honor?

11 THE COURT: Yes.

#### VOIR DIRE EXAMINATION

13 BY MR. GARZA:

14 Q. Good morning, Mr. Kocian.

15 A. Good morning.

16 Q. My name is Ed Garza. I think I had previously  
17 introduced myself to you and the other members of the jury  
18 panel back when we were in the larger group downstairs.

19 A. Yes, you did.

20 Q. My co-counsel, Mr. Grant Jones, and our client, John  
21 Henry Ramirez.

22 In Texas, under the rules of a criminal trial,  
23 we're required whenever a defendant or an accused asks for a  
24 jury trial, that he be given a trial by a jury of 12 impartial  
25 jurors. Do you agree with that rule?

1 A. Yes, I do.

2 Q. What does impartiality mean to you?

3 A. To me, it means that it's gonna have to proven to me,  
4 without a doubt, without a reasonable doubt, that he was -- the  
5 crime was committed by him.

6 Q. Would you agree with me that it sort of requires you  
7 to come to the job, come to the situation, come to the task  
8 without any preconceived notions?

9 A. Right. You need to come open-minded and just let the  
10 evidence speak for itself.

11 Q. Would you also agree with me that it requires you to  
12 come in here without any biases or any leanings?

13 A. Yes, it does.

14 Q. Wouldn't that be something you would expect --

15 A. Yes, I would.

16 Q. -- if you were in that situation?

17 A. That's right. That's right.

18 Q. I know this question's been asked of you, but I'm  
19 gonna ask it anyway. As you sit here today and see my client  
20 sitting here, do you have any preconceived notions as to  
21 whether or not he's guilty?

22 A. No, I don't.

23 Q. And if I were to ask you -- although we would never  
24 do that, it's not something that happens in our courtrooms --  
25 to vote as to his guilt or innocence, what would your vote be?

1 whatever?

2 A. Right.

3 Q. Okay. But, you know, you understand how we to have,  
4 you know, try to get people in here that are gonna be fair and  
5 impartial to both sides in this case and be convinced, you  
6 know, to whatever degree we can that you're gonna be fair and  
7 impartial in this case?

8 A. I understand.

9 Q. Along those lines, this is a capital murder case,  
10 which is as the judge had described to you, a murder plus  
11 something else, okay?

12 A. Uh-huh.

13 Q. It's very unique in the law in that there's  
14 situations where, you know, for example, somebody could come in  
15 here, and God forbid, you know, shoot Judge Galvan, okay? And  
16 that would be murder, okay? It wouldn't be a capital murder in  
17 so far as how awful you would probably read about it in the  
18 headlines and say, God, somebody, you know, walked into a  
19 courtroom and just, you know, shot a judge, you know, which has  
20 happened before, I think, somewhere in Atlanta.

21 A. Yes, it did.

22 Q. A defendant got loose and actually shot a judge.  
23 And, of course, it's terrible. But in Texas, that is not  
24 capital murder.

25 A. Right.

126

128

1 A. As of right now, it would be not guilty.

2 Q. And that's the correct answer.

3 A. Okay.

4 Q. What we mean by that is, of course, we actually have  
5 to go through a trial before we ask you to do that?

6 A. That's right.

7 Q. We want to know and be assured that you know these  
8 concepts and that you understand them and that you can adhere  
9 to them, okay?

10 A. Yes, sir.

11 Q. Because it's very important. Getting back to the  
12 subject of certain biases, you know, let's say, for instance,  
13 if you were Mr. Ramirez's uncle. I don't think you could serve  
14 on this jury because you'd have some sort of a family bias,  
15 wouldn't you?

16 A. That's correct.

17 Q. And similarly, just as an example, if Mr. Jones and I  
18 were trying a DWI, we might not want to pick a state trooper to  
19 serve on that jury, would we?

20 A. No, sir.

21 Q. We'd have an occupational bias; is that correct?

22 A. That's right.

23 Q. Same thing with an arson case, we might not pick a  
24 fireman. Although we want them to do their job and be biased  
25 in so far as trying to save our homes from being burned or

1 Q. Maybe it should be, I don't know, but it's not. And  
2 as a consequence, our legislature has seen fit to define what  
3 capital murder is, which is a homicide along with another very  
4 aggravated criminal act, criminal episode essentially. And so,  
5 knowing that concept, of course, it's still fits under the same  
6 requirements of being able to be unanimous in your verdict  
7 before you find a verdict one way or the other of guilt or  
8 innocence.

9 A. Right.

10 Q. Now, the reason we talk about all these kind of  
11 things is because this is the only chance we really have to  
12 talk to about these things, okay?

13 A. Right.

14 Q. We're not trying to do this because we are assuming  
15 that you're supposing anything, but it's just this is the only  
16 time we get to talk to you about all these things.

17 A. Yes, sir.

18 Q. Okay. Do you agree with that?

19 A. Oh, yes, sir, yes, sir.

20 Q. It doesn't cause you any alarm to think that, well,  
21 you know, well, why are we talking about all this and whatever,  
22 because, I mean, are we here making certain assumptions that we  
23 shouldn't be making or anything or what?

24 A. Well, I feel this is a very large decision to be made  
25 and you should have the right people on the jury.

1 Q. And it is important?

2 A. Yes, sir.

3 Q. Because it's important that we try and get it right  
4 the first time?

5 A. Yes.

6 Q. Because every now and then we actually -- not we, but  
7 some people have gotten it wrong. Like have you read,  
8 recently, there's a *Texas Monthly* article about these 37 some  
9 odd people who mostly came out of the Dallas area who had been  
10 convicted of certain rapes and murders, and things of that  
11 nature and whatever, based on the identification of one or two  
12 witnesses only. And then they found out later that they were  
13 actually innocent through the use of DNA. Do you remember  
14 reading or --

15 A. I --

16 Q. Maybe you read something --

17 A. I didn't read it but I've heard of that before --

18 Q. Of that happening?

19 A. -- over the years, uh-huh.

20 Q. How does that make you feel?

21 A. Well, at that particular time, the cases that I  
22 believe that they were talking about were ones early on during  
23 the years before DNA evidence was. And at that time, they --  
24 the evidence put forth to jurors made them vote the way of that  
25 he was guilty at that time. Now, if the DNA evidence would

1 THE COURT: Or at least the previous DA.

2 Q. (BY MR. GARZA) The previous DA had, not the present  
3 one. He's trying to make things better, believe me. But does  
4 it bother you that that kind of conduct went on that allowed  
5 innocent people to be convicted?

6 A. Well, sure. I mean, it wasn't 100 percent right. If  
7 you're saying that the DA held evidence that would have  
8 acquitted the witness, then, sure, that wasn't a fair trial any  
9 whatsoever. And hopefully, I never have to sit on a trial like  
10 that.

11 Q. Hopefully you won't either. And the other point that  
12 I want to make about that situation that we were discussing  
13 with the other jurors as well is that after 15, 20 years, these  
14 people get released, but they were at least alive to be able to  
15 be released, okay?

16 A. Correct.

17 Q. In a capital murder case, if we don't get it right,  
18 we make a by mistake, and the appellate process goes through,  
19 and we don't correct any of those mistakes or we don't find any  
20 of those mistakes to be able to correct, a person's -- a person  
21 could lose their life.

22 A. Uh-huh, that's right. Like you said on this, the  
23 defendant's character and background, you know, it's -- that  
24 should be brought before the jurors, what exactly what kind of  
25 man was this. I mean, he's gonna have friends that are gonna

1 have come up that there was no DNA evidence on this, the  
2 fingerprint was found on there because he worked their yard  
3 service at one time or something at that point, then -- so --  
4 but DNA evidence and all that isn't, I guess, 100 percent. It  
5 just depends on how it's -- it's shown to you at the time.

6 Q. Does it bother you though that perhaps because of  
7 some unfairness, perhaps on the part of the district attorney's  
8 office and withholding evidence or something or whatever, that  
9 some innocent person was unjustly accused and convicted of a  
10 crime?

11 MR. SKURKA: Excuse me, Judge, he's not  
12 talking about this district attorney's office, right?

13 THE COURT: Well --

14 MR. SKURKA: He's talking about up in Dallas,  
15 right?

16 MR. GARZA: Well, they get it right all the  
17 time down here, of course.

18 Q. (BY MR. GARZA) I'm just talking about -- I'm giving  
19 an example. But the one that's been notorious doing this is  
20 the Dallas DA's office.

21 A. Okay.

22 Q. They've been notorious for doing this. There are  
23 certain constitutional laws and certain constitutional cases  
24 that have come down that they have just outright violated, you  
25 know?

1 testify about him. He's gonna have parents or in laws and  
2 they're gonna have to tell the truth. If somebody was found  
3 guilty and it's on this is -- actually, if they're found guilty  
4 automatically have life. Now, what we're determining is if  
5 they get death and these questions here are very good that we  
6 have to decide that or the jury has to decide that by listening  
7 to the background and what type of person that the defendant  
8 is.

9 Q. And I'm gonna get to that.

10 A. Oh, okay. I'm sorry.

11 Q. No, that's okay.

12 A. Well, I'm just stating to me that if found guilty,  
13 that is a very important, very important question there. You  
14 can't -- it's hard to answer this question without knowing this  
15 answer to me. That's my opinion. If someone never did wrong  
16 and it was just kind of a freak deal then, sure, that's -- then  
17 you'd have to weigh in all of this on your -- the way you would  
18 answer these questions.

19 Q. Correct. And that's what we've asked you to do  
20 because, see, first of all, you have to find our client guilty  
21 if the State can prove their case to you beyond a reasonable  
22 doubt.

23 A. Correct.

24 Q. And then you're gonna ask -- you're going to be asked  
25 to start considering what is the appropriate punishment for our

1 client if you do find him guilty? What is the appropriate  
 2 punishment, is it life or is it death?

3 A. Right.

4 Q. And the way we reach that decision is based on  
 5 whatever evidence you hear to establish whether or not, one,  
 6 you can vote yes to that special issue number one, okay?

7 A. Uh-huh.

8 Q. Because it's like you yourself had mentioned, what if  
 9 this is a situational crime? What if this is the first and  
 10 only ever time that this has ever happened? Now, the law does  
 11 say that if you can -- you can take the circumstances of the  
 12 case and still decide that issue, okay?

13 A. Right.

14 Q. But we want to know if you will be open-minded enough  
 15 to hear any and all types of evidence including criminal  
 16 history, background, character, and things of that nature  
 17 before you make a decision as to whether or not you feel he's a  
 18 future dangerousness, that he's a person whose gonna -- who is  
 19 going to be a future danger to our society?

20 A. Right.

21 Q. Can you do that?

22 A. Yes, I can did.

23 Q. Can you keep an open mind about that?

24 A. Yes, I can.

25 Q. And you as the trier of the facts are the ones who

1 the type of person that they are.

2 Q. Okay. Would it be -- let me just throw some examples  
 3 out. You're in business for yourself?

4 A. Yes.

5 Q. You're in the carpet business; is that correct?

6 A. Yes, sir.

7 Q. So maybe you've had a set of customers that you had  
 8 for quite a few years. And whenever they call you that they  
 9 need some carpet installed in their buildings or in their home  
 10 or whatever, knowing their track record for paying you and  
 11 things of that nature --

12 A. Uh-huh.

13 Q. -- you believe those people to be of pretty good  
 14 character and you enjoy doing business with them?

15 A. Correct.

16 Q. Correct?

17 A. Uh-huh.

18 Q. And they're trustworthy, they're honest, they're  
 19 forthright; is that correct?

20 A. They have proven themselves to me, yes.

21 Q. They have proven themselves to you. A moral code of  
 22 some sort?

23 A. Right.

24 Q. Correct?

25 A. Correct.

1 are gonna have to decide what evidence, in your mind, is going  
 2 to convince you of that, and if you're not convinced of it, you  
 3 can say no to that Special Issue No. 1.

4 A. That's right.

5 Q. And it would require you and nine others only, okay?  
 6 But, otherwise, if you're going to say yes and you're gonna be  
 7 convinced beyond a reasonable doubt that he is a continuing  
 8 threat to society, it's gonna take all 12 of you.

9 A. Correct.

10 Q. And that's -- that's before you get to Special Issue  
 11 No. 2, okay?

12 A. Okay.

13 Q. Before you even get to Special Issue No. 2. And if  
 14 you would, can you take a minute and read that Special Issue  
 15 No. 2 and let me know when you're done with it?

16 A. Okay.

17 Q. So he's taking into consideration the circumstances  
 18 of the offense and the defendant's character and background.  
 19 What does character mean to you?

20 A. Character means the type of person that they are. I  
 21 mean, are they something as being a young person? Do they just  
 22 go out and party and get in at a certain time? Do they take  
 23 care of whoever, their family and their parents, and were they  
 24 good to people. Or character's gonna come up and just say all  
 25 the negative things about them too. And it's gonna kind of be

1 Q. It's something you would probably say, "I sure hope  
 2 somebody says that about me every now and then." Would that be  
 3 correct?

4 A. Yes. Yes, sir.

5 Q. And what about a person's background?

6 A. Now, the background -- the background as far as --  
 7 are you talking about as in a situation of me being a business  
 8 owner or as --

9 Q. Yeah, sure.

10 A. Or as -- well, the only background I would have of  
 11 those particular people is like you say is how they pay their  
 12 account and how the sales people thought about them. And a lot  
 13 of customers become, you know, exactly friends of ours, and  
 14 hopefully become part of our family.

15 Q. In the legal system, background can mean a lot of  
 16 other things. What would be some of the things that you would  
 17 want to know about a person's background to find out whether or  
 18 not there's a sufficient mitigating circumstance for you to  
 19 lessen their punishment or maybe even increase their  
 20 punishment?

21 A. Well, exactly like I had just said before, I guess it  
 22 depends on the character or the type of person they were.

23 There's gonna be like how did they treat their friends? Were  
 24 they somebody that constantly pushed around, hit people, were  
 25 always violent at some time. There's people that are -- that

1 are perfect people, I mean, you just think. And then you give  
 2 them a drop of alcohol or some dope and they just turn 100  
 3 percent to a complete devil. And that's the things that you  
 4 would want to know of this is from friends and people that they  
 5 have been with.

6 The other backgrounds, like you said, is how  
 7 they took care of other people. Not necessarily that -- not  
 8 that you take care of but being nice to people. What do the  
 9 neighbors think of them. I mean, was he always nice to them,  
 10 did he help them out, or was he with the one that always threw  
 11 trash in their yard as he was growing up, or disrespectful and  
 12 things of that nature.

13 Q. What about in so far as background is concerned,  
 14 where he came from, how he was raised? What if he was abused?  
 15 What if he lacked the nurturing? What if he lacked parental  
 16 guidance? What if he lacked parental correction? What if  
 17 there is was no effective parental authority guiding this young  
 18 man through his life? Would that make a difference to you?

19 A. It would, and there again, it wouldn't. There's a  
 20 lot of people that came from broken homes that wanted to  
 21 advance and become better themselves, work themselves through  
 22 college, worked hard to get away from this and bound that they  
 23 would never strike a person or one of their children. There  
 24 again, now, if they were beaten, kept in closets, things of  
 25 nature, then that could drastically affect the mind and make

1 wrong. And if for some reason in their mind they don't feel  
 2 beating up on people is wrong, then that's gonna be part of  
 3 their moral character, and so I guess that's exactly what it  
 4 means to me.

5 Q. Kind of a blemish --

6 A. That's correct.

7 Q. -- in your mind? Well, being moral is sort of a --  
 8 it's sort of a core belief that you either believe or don't  
 9 believe in something biblical or the Ten Commandments or  
 10 something like that.

11 A. Right.

12 Q. Culpability is -- would you consider it  
 13 blameworthiness?

14 A. The --

15 Q. Blameworthiness?

16 A. No, I don't. No, I don't.

17 Q. Why not?

18 A. Because there -- it's -- everybody can change. I  
 19 mean, anybody can change. It's what's deep down inside you  
 20 that just because you were raised up in a poor neighborhood  
 21 doesn't mean that you can't become president of the United  
 22 States. It doesn't mean that you have limitations on what that  
 23 -- I see that every day that people limit themselves and they  
 24 don't have to. You can do what you want to in this country,  
 25 and to say that just because my parents were born poor, I'm

1 them maybe more violent.

2 Q. What that special issue there is asking you is can  
 3 you give some effect to that person's background knowing and if  
 4 it's shown to you that that could be something that is making  
 5 this person act a certain way in trying to establish this  
 6 degree of culpability or his degree of guilt in this case?  
 7 Could you give it some effect to assist you in making a  
 8 decision?

9 A. Yes, I could.

10 Q. Because some people just say, well -- and it's like  
 11 you just said, it could or couldn't, you know, it just depends  
 12 on what I hear. Some people they have been able to overcome  
 13 those things. Would you agree with me it's a little more  
 14 difficult than the ideal situation where maybe a person's grown  
 15 up with two loving parents, grandparents, other family members  
 16 who was able to learn right from wrong and have the guidance of  
 17 those parents, the guidance of his teachers, perhaps the  
 18 teachings of his church, and things of that nature?

19 A. Yes.

20 Q. It would make a big difference, wouldn't it?

21 A. Yes, it does. It does.

22 Q. Then this issue of personal moral culpability, what  
 23 does that mean to you?

24 A. I guess to me it would mean exactly what the  
 25 defendant believes in himself or what he believes is right or

1 gonna be poor; I have to steal and rob to get ahead in this  
 2 life, that's not true. You just -- if you work hard, you will  
 3 -- you can succeed.

4 Q. Correct. And I -- you know, I'm not sure -- poverty  
 5 can certainly have an effect on certain people. I always  
 6 remember my father telling me about Richard Todd who my dad  
 7 thought was a rather flamboyant person. He was married to  
 8 Elizabeth Taylor and was a big movie producer. He said that  
 9 Todd used to have this saying that says, "Being broke is  
 10 temporary, but being poor is pretty permanent."

11 A. Right.

12 Q. And I think studies have shown that poverty has a  
 13 very cyclical component that can continue for years and years  
 14 within a certain family. But you're right, it doesn't  
 15 necessarily mean that people grow up to be evil or ugly, or  
 16 terrible, or a criminal. They just never quite grow out of  
 17 that condition. They have to work pretty hard all the rest of  
 18 their lives.

19 A. It's true.

20 Q. And they -- and there's some that do stay out of  
 21 trouble, by the grace of God, or through the grace of whatever.  
 22 But for some people it does become a dilemma, it becomes a very  
 23 big dilemma.

24 In the example that Mr. Skurka gives you about  
 25 the curfew and things of that nature, or I don't know if he

1 told you about the burglary story or not, about the differences  
 2 in punishments?

3 A. Yes, sir.

4 Q. As to, you know, the guy who breaks in the house and  
 5 tears everything up, steals valuables and whatever to support  
 6 his drug habit, has been convicted of doing that five times  
 7 versus the guy that does it because he's lost his job, he's got  
 8 four starving children and he finds the door open and walks in  
 9 and basically just takes a loaf of bread and some food to feed  
 10 his children. That issue on the moral culpability is sort of a  
 11 degree of guilt situation where maybe if you're sitting on the  
 12 jury regarding the first burglary and you'd say, "Gosh, this is  
 13 a guy that just never learned his lesson. You know what, I  
 14 just need to put the wood to him and that's all there is to it  
 15 and I'm gonna sentence him to 20 years." But this other guy,  
 16 you know, even though he did commit a burglary and he knew it  
 17 was wrong, he was faced with a moral dilemma. What would you  
 18 say his moral dilemma probably was?

19 A. Well, he was -- no money, no money to support his  
 20 family. And, you know, with no money and no family to support  
 21 would cause a lot of people to still to feed, and that --  
 22 that's the -- that's the circumstances that you're using right  
 23 there.

24 Q. It makes a difference, doesn't it?

25 A. It makes a lot of difference.

1 A. Right.  
 2 Q. Okay?  
 3 A. Right.  
 4 Q. And it has to be an independent decision on your  
 5 part.  
 6 A. I agree with that.  
 7 Q. Not a decision you get bullied into doing by the  
 8 other 11 or 12 depending whichever way they're leaning on this  
 9 case.  
 10 A. Right.  
 11 Q. The last question I'm gonna ask you is that do you  
 12 think that -- I mean, in Texas, the death penalty is the  
 13 legislative sanction, is a legislative punishment that in the  
 14 law allows through this process for that to be handed down as a  
 15 punishment, okay? Do you think that we, as a society, we as  
 16 citizens of Texas, do you think that there is a benefit derived  
 17 from that?

18 A. The benefit that you -- I guess you're asking me is  
 19 there a benefit for the death penalty for people that commit  
 20 crimes. I believe just taking them off the street and  
 21 protecting society as it is. If you have somebody that  
 22 committed murder on that and every time he takes a drink he  
 23 becomes extremely violent, then, you can't say that he's not  
 24 gonna take another drop of alcohol the rest of his life, that  
 25 he -- he may need to be taken off the street. And if that --

1 Q. It's a mitigating circumstance, isn't it?

2 A. Correct.

3 Q. The dilemma was, I know that it's wrong to steal, but  
 4 how am I gonna let these children starve, I've got to do  
 5 something.

6 A. That's right.

7 Q. Okay. And that may or may not be present in this  
 8 case, we don't know yet, you know. But we need to know that  
 9 those circumstances are things that you can give effect to in  
 10 deciding, not automatically, that, God, if I find this man  
 11 guilty of this crime, you know, I'm going to just automatically  
 12 give him the death sentence. I'm gonna think about it.

13 A. Sure.

14 Q. I'm gonna listen to the evidence, I'm gonna, you  
 15 know, weigh all of these situations and circumstances --

16 A. That's right.

17 Q. -- before I make that decision, okay?

18 A. Right.

19 Q. So if you answer yes to this that you feel that based  
 20 on whatever evidence is presented to you, that there is  
 21 sufficient mitigating circumstances and you answer -- if you  
 22 answer no and yes to the other, it's the death penalty?

23 A. Right.

24 Q. If you answer yes, and yes, that there is, then it's  
 25 a life sentence.

1 if it is for capital murder, it's something that he did on  
 2 that, then, yes, I believe in the death penalty.

3 Q. So you think it has a deterrent benefit?

4 A. Yes.

5 Q. And it also has a protective benefit?

6 A. Correct.

7 Q. Does all of that outweigh the possibility that  
 8 someone could be wrongly convicted and executed?

9 A. I believe it can happen, but for I personally to make  
 10 this decision, I'm -- it's gonna have to be proven to me. It's  
 11 -- and there -- and just like the judge said, a reasonable  
 12 doubt, that it's just -- I'm not gonna sit here lightly and  
 13 listen to this evidence and fall asleep. It's gonna have to be  
 14 100 percent proven to me.

15 MR. GARZA: Thank you, Mr. Kocian. I have no  
 16 other questions.

#### 17 VOIR DIRE EXAMINATION

18 BY MR. SKURKA:

19 Q. I just have one follow up.

20 A. Yes.

21 Q. Remember that the law doesn't say 100 percent. It  
 22 just says beyond a reasonable doubt.

23 A. That's what I meant a reasonable doubt, not 100  
 24 percent.

25 Q. You scared me when you said 100 percent.

1 A. No, a reasonable doubt that it's proved to me.  
 2 Q. And that's all I'm gonna ask you is beyond a  
 3 reasonable doubt, just not 100 percent?  
 4 A. That's right.  
 5 Q. There's no way I can prove to you 100 percent unless  
 6 you were there and saw the thing yourself.  
 7 A. Right.  
 8 MR. SKURKA: Thank you, sir.  
 9 THE COURT: Mr. Kocian, wait in the jury room  
 10 while I speak with the lawyers and get right back with you.  
 11 VENIREPERSON NO. 64: All right. Thank you.  
 12 (Venireperson exits courtroom.)  
 13 MR. SKURKA: Your Honor, State will accept  
 14 this juror.  
 15 THE COURT: All right. What says the defense?  
 16 MR. GARZA: May we confer for a minute?  
 17 THE COURT: Yeah.  
 18 (Counsel conferring.)  
 19 THE COURT: What say you?  
 20 MR. GARZA: Judge, we're going to exercise  
 21 another peremptory.  
 22 THE COURT: All right. That will be No. 9.  
 23 MR. GARZA: Correct, Your Honor.  
 24 THE COURT: Let's bring him in.  
 25 (Venireperson enters courtroom.)

1 last week.  
 2 THE COURT: Okay. Well, why don't you-all  
 3 talk about it right now on this bathroom break. I just need  
 4 to know because we got nine coming in tomorrow, and if we're  
 5 gonna -- if you-all are gonna agree to excuse them, that's  
 6 fine. If not, that's fine too, but, you know, I think we can  
 7 get through how many today? Nine maximum. I just -- at the  
 8 rate we're going. And we can start the next person I'll do my  
 9 spiel and go to lunch on the next person. But for the people  
 10 that are here which is 77, 79, 80 and 81, I mean, it seems to  
 11 me I can let 79, 80 and 81 go to lunch. There's no point in  
 12 leaving them here, correct? Unless -- unless you-all are  
 13 gonna agree on 77?  
 14 MR. SKURKA: I don't think that's one of the  
 15 ones. I had on my list 79, 81 and 82 were possible  
 16 agreements --  
 17 THE COURT: 79, 80 --  
 18 MR. SKURKA: -- and I don't think they're  
 19 gonna be seated. 79 couldn't answer some of the questions  
 20 about the death penalty where it said --  
 21 THE COURT: Okay. Well, let's do this. Let's  
 22 do this. Frank, tell 79, 80 and 81 to come back after lunch.  
 23 77 has to wait, and then we can, you know, we can deal with  
 24 that issue.  
 25 79, 80 and 81, they're here, right?

146

1 THE COURT: All right. Mr. Kocian, you were  
 2 not selected to be on this jury but we do appreciate you  
 3 coming down here and spending time with us, and I'm sorry you  
 4 had to come down here twice.  
 5 VENIREPERSON NO. 64: Okay. Thanks.  
 6 THE COURT: If you need work -- well, I guess  
 7 you own your own business?  
 8 VENIREPERSON NO. 64: That's right.  
 9 THE COURT: All right. Thank you.  
 10 MR. GARZA: Judge, can we --  
 11 THE COURT: Hold on.  
 12 MR. GARZA: Can we take a little break?  
 13 THE COURT: Okay. Look -- yes, yes. The  
 14 answer's yes. Let's do this. We're gonna have -- at the rate  
 15 we're going -- and I did handicap us by 15 minutes, but we've  
 16 gone through three jurors this morning and we did excuse one.  
 17 That leaves us with nine.  
 18 THE DEFENDANT: 9.  
 19 THE COURT: Nine left. It's not gonna happen,  
 20 okay? So, realistically, how many do you think we can get  
 21 through because she's gonna have to start rescheduling?  
 22 MR. SKURKA: I think we can get to -- I think  
 23 three of them are gonna be eliminated, Judge.  
 24 THE COURT: Okay. Well, let's talk about it.  
 25 MR. SKURKA: I've been talking about it since

148

1 THE BAILIFF: Yes.  
 2 THE COURT: Tell them to go to lunch. Tell  
 3 them to come back after lunch. Leave 77 here. I want to try  
 4 to get through my spiel with that person before we go to  
 5 lunch, and then you-all can do your thing with them after  
 6 lunch. But at least we can get a little bit done before then.  
 7 MR. JONES: Who is up next, 79?  
 8 THE COURT: 77 is up next. All right. Take a  
 9 little break. Maybe you-all can talk. But in any event,  
 10 don't you think we need to reschedule the 3:00s? I mean, it's  
 11 just not happening. Mark?  
 12 MR. SKURKA: I think we can do some if we get  
 13 rid of these other three.  
 14 MR. GARZA: Well, it's easy for him to say,  
 15 Judge, but we're in a pickle. We're not -- we don't have that  
 16 same grace, okay?  
 17 MR. SKURKA: And I understand, Judge.  
 18 THE COURT: I understand.  
 19 MR. GARZA: I just -- Mr. Jones and I have  
 20 looked over the remaining --  
 21 THE COURT: Wait, wait. Just tell her to wait  
 22 just a second, Frank. Why don't you-all talk. Look, if you  
 23 can't, it's okay. I just -- if you-all aren't gonna agree, I  
 24 just need to cut those 3:00 people loose till tomorrow.  
 25 MR. GARZA: At this point we can't.

1                   THE COURT: We'll be here till -- I mean, if  
 2 we try to do 13 -- well, it really be 12 -- we'll be here till  
 3 1:00 in the morning at the rate we're going which --  
 4                   MR. GARZA: It could be too that if we do --  
 5                   MR. SKURKA: That's pretty good --  
 6                   THE COURT: No, we're doing fine. And I'm not  
 7 complaining about the speed. My only thing is if we need to  
 8 reschedule them, right now I can do it. I don't want the 3:00  
 9 people to drive here like that poor guy that we just did and  
 10 then we don't use them. And right now, I have the ability to  
 11 call him off. But let's take a break and we'll talk about it  
 12 in a minute.

13                  THE BAILIFF: Judge, the people that are going  
 14 for lunch, you want them back at what time?

15                  THE COURT: I guess 1:00.

16                  (Recess.)

17                  THE COURT: I guess before we get to the next  
 18 deal, are we anywhere on agreements or --

19                  MR. GARZA: No.

20                  THE COURT: No. All right. Well, I'm gonna  
 21 call off the 3:00 people. There's just -- I mean, we're --

22                  THE COURT MANAGER: Which is 85 and 87?

23                  THE COURT: Yeah.

24                  Even so, that's still -- yeah, let's call  
 25 those people off for now.

1                  criminal case before?

2                  A. No.

3                  Q. Have you ever been on a jury before?

4                  A. No.

5                  Q. And that's okay. We are looking for people that,  
 6 one, can keep an open mind, and two, will follow the law, okay?

7                  Do you think that you can keep an open mind in this case?

8                  A. Yes.

9                  Q. Okay. Well, some people say they can't because maybe  
 10 they saw something on TV or maybe they say they can't keep an  
 11 open mind just because some people just can't. But you think  
 12 you can?

13                  A. Yes.

14                  Q. Okay. Then let's talk a little bit about the law.

15 This is a criminal case, okay? In every criminal case, the  
 16 State has the burden of proof, okay? They brought the charges.  
 17 The law says you bring the charges, you prove them. Do you  
 18 think that's fair?

19                  A. Yes.

20                  Q. Can you follow that law?

21                  A. Uh-huh.

22                  Q. Okay. Now, the burden of proof is on them and what  
 23 is the burden? It's beyond a reasonable doubt. And what's  
 24 that? Well, let me tell you what it's not. It's not like if  
 25 we had a civil case, maybe we had like a contract case, a fight

150

152

1                  THE COURT MANAGER: For what time tomorrow?

2                  THE COURT: What time do we have? I guess  
 3 we'll put them first thing in morning at 8:00.

4                  MR. GARZA: Who is up next?

5                  MR. SKURKA: 77.

6                  THE COURT: 77, Josephine Guerrero. I guess  
 7 bring her in and I'll do my spiel with her and we'll go to  
 8 lunch.

9                  MR. SKURKA: We're coming back at 1. Do we  
 10 have one at 1, Ann?

11                  THE COURT MANAGER: Uh-huh.

12                  THE COURT: Yeah, plus the other four.

13

14                  VENIREPERSON NO. 77,  
 15                  JOSEPHINE GUERRERO GOMEZ,  
 16                  VOIR DIRE EXAMINATION

17 BY THE COURT:

18                  Q. All right. Ms. Guerrero, how are you?

19                  A. Just fine, thank you.

20                  Q. Sorry about the wait. We got a little behind. This  
 21 is a serious case so we're giving it the time and attention  
 22 that it needs, okay?

23                  A. Okay.

24                  Q. I'm gonna talk to you about a few things and then  
 25 we're gonna go to lunch. First of all, have you ever been on a

1 between two businesses. One would sue another and we'd have --  
 2 the one that was suing the other would have the burden of  
 3 proof. They would have to prove the case to the jury. And it  
 4 would be by preponderance of the evidence. That is like if you  
 5 can think of the scales of justice, that's like tipping it over  
 6 just one -- just a little bit. It would be 51 percent, okay,  
 7 proof. That's -- to me, that's the easiest way to think of it,  
 8 51 percent, just a little bit more.

9                  A. Okay.

10                 Q. Then let's say the State was trying to take away some  
 11 children from somebody because the State felt like they were  
 12 not good parents, all right? The burden of proof in that case  
 13 is clear and convincing, okay?

14                 A. Right.

15                 Q. That sounds pretty self-explanatory, right, clear and  
 16 convincing?

17                 A. Yes.

18                 Q. It sounds like it has to be pretty good stuff.

19                 That's higher than the 51 percent, but it's not as high as this  
 20 the burden in this case, beyond a reasonable doubt. That's  
 21 higher than clear and convincing, all right? It's the highest  
 22 burden that we have in all of the law, criminal or otherwise.

23                 But what it also is not, is it's not beyond all  
 24 doubt, it's not beyond a shadow of a doubt. The most important  
 25 word in it, in my opinion is reasonable, beyond a reasonable

1 doubt. Okay?

2 A. Okay.

3 Q. Do you follow me?

4 A. Yes.

5 Q. Could you hold the State to that burden?

6 A. (Nodding head up and down.)

7 Q. Yes?

8 A. Yes.

9 Q. Okay. Now, as part of that, our law says that until  
10 the State, if they can prove it – we don't know if they can  
11 prove this case or not, right?

12 A. Right.

13 Q. They brought the charges but they just say that this  
14 defendant did this crime, but who has to be proven? The  
15 people. The people hold the power here, okay? The State  
16 brings the charges but they have to prove it to the people and  
17 the law says that until you can prove it, you must presume that  
18 the defendant is innocent until proven guilty. You've ever  
19 heard of that before?

20 A. Yes.

21 Q. Innocent until proven guilty and that's how we do it  
22 here. And I think it would be a sad place to live if it wasn't  
23 like that, okay? You agree with that?

24 A. Yes.

25 Q. And you could presume the defendant to be innocent?

1 A. Yes.

2 Q. Okay. Now, the Constitution says since the State's  
3 got the burden of proof and the defense has not burden,  
4 defendant doesn't have to testify, okay? And it's bigger than  
5 that. Not only does defendant not have to testify, but the  
6 jury can't hold it against him if he chooses not to. Do you  
7 follow me?

8 A. Yes.

9 Q. Okay. Now, I think, you know, maybe these lawyers  
10 tell him not to. Maybe his lawyers tell him they haven't  
11 proven their case. Maybe he's just not somebody that speaks  
12 well in public and his lawyers feel like, you know, he may --  
13 he may not come off well. I had a friend who would laugh  
14 inappropriately when he got nervous and he would annoy people.  
15 Maybe he's one of those people. Maybe he's just not educated.  
16 It's unclear, okay? But the point is this: The law says you  
17 can't hold it against him if he chooses not to testify. Could  
18 you follow that law?

19 A. Yes.

20 Q. Okay. Now let's talk about the type of case this is.  
21 It's capital murder. Okay. Well, what's capital murder?  
22 Well, murder is in that, right? So what is murder? Murder is  
23 the intentional taking of a life of another, okay? But you  
24 know, this is capital murder. Well, it's got to be something  
25 else, right? I like to call capital murder, murder plus,

1 A. (Nodding head up and down.)

2 Q. Until and if the State could prove it otherwise?

3 A. Correct.

4 Q. Because sometimes we ask jurors at this point, well,  
5 how would you vote. They get a little stumped. The fact of  
6 the matter is you'd have to vote not guilty. Why? Because  
7 they haven't proven anything?

8 A. They haven't said anything.

9 Q. They haven't said anything, okay? But a more real  
10 life example is if when we begin the trial and State presents  
11 their evidence, and they do present some evidence, but it's --  
12 you go back there and you think that's not that good. They  
13 didn't prove anything to me. What would you -- how would you  
14 have to vote?

15 A. If they haven't proven their point, no. Innocent.

16 Q. Not guilty, right?

17 A. Right.

18 Q. Now, you understand that not innocent and not guilty  
19 are different things, okay? I had a trial a couple of weeks  
20 ago and I saw one of my jurors at a wedding this weekend and he  
21 said, "You know, Bobby, I thought that guy was guilty, but they  
22 didn't prove it to me beyond a reasonable doubt so we found him  
23 not guilty." And there's nothing wrong with what that juror  
24 did because the burden is beyond a reasonable doubt; he felt  
25 like they hadn't gotten there yet; do you follow me?

1 murder plus something else. The legislature has said there are  
2 a newspaper of things that qualify as capital murder and  
3 there's a laundry list.

4 In this case, the State as alleged that the  
5 defendant committed or attempted to commit the offense of  
6 robbery, and in the course of doing so, he committed murder.  
7 Okay. So we got robbery plus murder. The legislature says if  
8 you put these two serious crimes together, then that's capital  
9 murder, okay?

10 A. Okay.

11 Q. All right. What's robbery? Well, robbery is the --  
12 is the intentional -- the forcible taking of something from  
13 another, or, you know, threatening to take -- to -- threatening  
14 harm to get, you know, an item from another. For example,  
15 let's say I came up to you and I held a gun to you and I said,  
16 "Give me your purse, okay?" That would be robbery, right?

17 A. Right.

18 Q. And you'd give me your purse and I'd run off with  
19 your purse. What if I came up to you and I held the gun and  
20 you took the purse and in your purse was, you know, something  
21 very heavy and you hit me on top of the head with it and  
22 knocked me out, okay? Would I be guilty of robbery? Well, no,  
23 I wouldn't be guilty of robbery, but I would be guilty of  
24 attempted robbery, right?

25 A. Right.

1       Q. The State can get there either way on it. In other  
 2 words, if they show a robbery or an attempted robbery in this  
 3 case, and then they can show that the defendant committed the  
 4 act of murder while in the process of doing that, then they get  
 5 there, okay? Do you understand?

6       A. Yes.

7       Q. All right. But you've got to understand there's a  
 8 lot of elements. They've got to prove all the elements of  
 9 murder. They've got to prove all the elements of robbery and  
 10 attempted robbery. They have to prove this defendant, on the  
 11 given day in Nueces County, Texas, did so. And the law says  
 12 they've got to prove all the elements. Would you require them  
 13 to prove all their elements?

14      A. Yes.

15      Q. Now, we have two parts of a trial in Texas. The  
 16 first part is guilt or innocence. What's that? Well, can the  
 17 State prove beyond a reasonable doubt that the defendant's  
 18 guilty of capital murder? And if they can't, the jury finds  
 19 the defendant not guilty and the cases is over with. You go  
 20 home. But if they can, we go on to the second part, the  
 21 punishment phase. The punishment phase I can tell you -- let  
 22 me back up. There's two things that can happen if you're found  
 23 guilty of capital murder and they're both serious. Life in  
 24 prison or the death penalty, okay?

25           All right. But you don't say life or death.

1       he a good kid in school or was he a bad kid in school, that  
 2 kind of stuff. -- "and the personal moral culpability of the  
 3 defendant." And that is, maybe, you know, sounds kind of  
 4 strange, but how guilty is he? I mean, the circumstances may  
 5 be different for different crimes, all right? How was he  
 6 brought up? What moral values did his parents instill in him,  
 7 okay? Do you follow me?

8       A. Yes.

9       Q. "Is there sufficient mitigating circumstance or  
 10 circumstances to warrant life rather than the death penalty be  
 11 imposed?"

12           This is kind of like the look at everything  
 13 question, okay? The first part of the case all you're gonna  
 14 hear about is the allegations of the crime itself, all right?  
 15 You're not gonna hear about his background. All you're gonna  
 16 determine is whether the State can prove beyond a reasonable  
 17 doubt that this defendant's guilty, okay?

18      A. Okay.

19      Q. The second part you can -- I don't know what you're  
 20 gonna hear, but you can hear about his life. Is this  
 21 completely out of character? Other than this day, has he been  
 22 a great guy? Maybe the opposite is true. Maybe he's got a bad  
 23 criminal history. Maybe he's been a bad kid all his life.  
 24 Maybe he was a bad kid in school. Maybe he was just a mean  
 25 guy. Maybe he was a good guy, okay? You have good things, bad

1       You answer questions, okay?

2       A. Okay.

3       Q. All right. Here's question number one if you read it  
 4 with me,

5           "Is there a probability that the defendant will  
 6 commit criminal acts of violence that would constitute a  
 7 continuing threat to society?" What does that mean?

8       A. If he gets out, if he's capable of doing it again.

9       Q. Kind of, okay? But let's go through it.

10      Probability. All right. Is it -- will he probably commit  
 11 criminal acts of violence. Will he be violent with people in  
 12 the future? Okay. All right. Now, the jury has to answer yes  
 13 or no, okay?

14      A. Okay.

15      Q. Now, then you go to Special Issue No. 2, it's the  
 16 second question. It's over your right shoulder. "After taking  
 17 into consideration all of the evidence, including the  
 18 circumstances of the offense" -- that's the first part of the  
 19 trial, okay?

20      A. Okay.

21      Q. The guilt or innocence phase. -- the defendant's  
 22 character" -- you know, what kind of guy is he, all right? Has  
 23 he been a good guy or a bad guy, and his background, you know,  
 24 how did he grow up? You know, did he have -- did he have a  
 25 good home, did he have a bad home? How was he in school? Was

1       things, maybe. I don't know what you're gonna hear, all right?

2           But down there it says, "Is there sufficient  
 3 mitigating circumstance or circumstances that warrant life or  
 4 death," right? So you have to consider everything that's  
 5 presented to you in the case. And you -- and you say, all  
 6 right, what's a mitigating circumstance? Well, it's something  
 7 that makes it less, makes him maybe less culpable, okay? Maybe  
 8 you think he was an Eagle Scout. Let's say it's presented to  
 9 you and you think, that's a mitigating circumstance. I'm just  
 10 giving you an example. I don't know what the evidence is going  
 11 to be. But maybe another juror thinks that's not mitigating.  
 12 That doesn't mean anything to me, okay? Only the jury can  
 13 decide what a mitigating circumstance is. These lawyers will  
 14 try and tell you what they think a mitigating or an aggravating  
 15 circumstances is, but only the jury can come up with that,  
 16 okay?

17      A. Okay.

18      Q. Like maybe he taught little kids to read. You may  
 19 think, that's a mitigating circumstance. Then the question  
 20 becomes you think take all the mitigating circumstances and you  
 21 say, is that sufficient? Is that enough? Yes, I think this is  
 22 a mitigating circumstance, but is it enough to warrant life or  
 23 death, and the jury would answer yes or no to this, okay?

24      A. Okay.

25      Q. I'm gonna ask the jury at the beginning of this case

1 to raise their right hand once we've selected them and say, do  
 2 you take -- do you take an oath? Do you swear that you will  
 3 render a true verdict based on the law presented to you, okay?  
 4 A. Okay.

5 Q. Some people say they can't do that because they can't  
 6 participate in a process that will lead to someone's death.  
 7 Some people say, if they find him guilty of capital murder,  
 8 they will always assess the death penalty. They won't follow  
 9 the law. Neither of those people can take that oath. They  
 10 cannot follow the law. They've told me they can't. Can you  
 11 take the oath and follow the law?

12 A. I don't see why not.

13 Q. Okay.

14 A. As long as the evidence is, you know, one way or the  
 15 other.

16 Q. No, I understand. But you see what I'm saying? Some  
 17 people just can't participate in this or some people they say,  
 18 "You know what, you take a life and I don't care about the law,  
 19 you're getting the death penalty in my book." And I'm -- some  
 20 people are like that. It's okay. And neither of them are  
 21 following the law. I need to know if you can follow the law?

22 A. Yes.

23 Q. All right. Let's do this. Let's break for lunch.  
 24 We'll see you after lunch about 1:00 and we'll start up again.  
 25 The lawyers are gonna get to ask you questions when we get

1 Q. -- but the microphone does.

2 A. Okay.

3 Q. How's that?

4 A. Is that better?

5 Q. Yeah, that's fine.

6 A. Okay.

7 Q. We just want to make sure everybody can hear you  
 8 okay.

9 So let me ask you, ma'am, how did you feel about  
 10 it that first day -- remember that day we had that big room  
 11 full of people, like 200 people in that room, and the judge  
 12 came down and said, "Folks, this is a criminal case, and it's  
 13 not just any criminal case, it's a possible death penalty case,  
 14 that this young man over here could be facing the death  
 15 penalty." Tell me how you first reacted when you heard it was  
 16 that kind of a case?

17 A. It didn't phase me.

18 Q. It didn't phase you at all?

19 A. No. It just seems that crime is getting higher and  
 20 higher.

21 Q. Well, tell me a little more about that.

22 A. Oh, it just seems like, you know, instead of working  
 23 for things, people are trying to take it from others, and they  
 24 don't want to work for it anymore.

25 Q. Do you feel that's kind of a part of our -- I mean,

1 back, okay?

2 A. Okay.

3 THE COURT: All right. See you after lunch.

4 (Noon recess.)

5 THE COURT: Are you ready to go?

6 MR. GARZA: We're ready.

7 THE COURT: Let's bring her in.

8 (Venireperson enters courtroom.)

9 THE COURT: All right. Mr. Skurka, you're up.

10 VOIR DIRE EXAMINATION

11 BY MR. SKURKA:

12 Q. As the judge introduced me, my name is Mark Skurka,  
 13 I'm an assistant district attorney, along with Geordie  
 14 Schimmel, the young man that was sitting here earlier. We'll  
 15 be the ones presenting this case to you if you get selected on  
 16 this jury. I want to start off by telling you there's no right  
 17 or wrong answers to anything you say. We just need to know how  
 18 you feel about things on some of the issues and the law on this  
 19 case so we can make a decision whether you're qualified, okay?

20 A. Okay.

21 Q. Do you mind putting the microphone just a little bit  
 22 closer to you so we can hear you better?

23 A. (Venireperson complies.)

24 Q. I don't think the chair moves --

25 A. No.

1 how our society is going these days?

2 A. Yes, they are too used to people giving them  
 3 everything.

4 Q. Well, we've always had crime probably. Do you think  
 5 it's gotten worse in the last few years or it's always been  
 6 bad?

7 A. I don't know if it's maybe media coverage. It just  
 8 seems to me that it has gotten worse, you know. The people  
 9 committing the crimes are getting younger and younger. I don't  
 10 know if it has to do with the media, like I said, movies, TV,  
 11 whatever. It just seems like a lot. They're not being told  
 12 what's right and wrong anymore.

13 Q. Is that because there -- do you think it's because  
 14 the way people grow up in their environment, or do you think  
 15 that it is something they just choose to be that way or what?

16 A. Sometimes I think they choose this life because it's  
 17 easier for them. Other times I think it's just because the  
 18 parents aren't around often enough. There's just too many  
 19 single parent households.

20 Q. Does that -- is that an excuse to commit crimes?

21 A. No, it's not, but they've got -- they don't have  
 22 enough people -- how can I say it. A single parent cannot  
 23 watch over the children and provide for them at the same time.

24 Q. But would you agree with me sometimes even though a  
 25 person has a hard circumstance when they're growing up and

1 they're kids, maybe they don't have a second parent or  
 2 something like that, that doesn't necessarily mean they're  
 3 gonna turn out bad, does it?

4 A. No, of course not.

5 Q. In fact, there's quite a few people that have gone on  
 6 to many great things even though they came from a bad  
 7 neighborhood, you know, from the *barrio*, or, you know, having  
 8 one parent or a broken home or something like that. Would you  
 9 agree with me on that?

10 A. Yes, you can overcome it.

11 Q. What do you think about people who use that as an  
 12 excuse?

13 A. I don't -- I don't really -- everybody has a hard  
 14 life, let me put it that way, and everybody can swing one way  
 15 or the other. It's just in their nature.

16 Q. So what it sounds to me like you may have started out  
 17 with bad circumstances, but you can still make yourself  
 18 something better, right?

19 A. Right.

20 Q. In other words, just because, you know, your parents  
 21 weren't rich, or maybe you only had one parent or you had to --  
 22 your parents had to work two, three jobs, you know, then they  
 23 weren't around, that would not be an excuse to go take the easy  
 24 way out by committing crimes?

25 A. No, it's not an excuse.

166

168

1 Q. Okay. What do you think about the age of a person?  
 2 I notice in your questionnaire you had something about you  
 3 don't think you should do the death penalty for I think you  
 4 said 13- and 15-year-olds, and stuff like that. Do you  
 5 remember writing on that?

6 A. Uh-huh.

7 Q. Well, that's pretty much what the law says. The law  
 8 says, in Texas, you can't get the death penalty if you're under  
 9 18 years of age. They just made a deal. You can do the worst  
 10 crime in the world if you're 16 years old, 17 years old, but  
 11 you can't get the death penalty. And I guess that's, you know,  
 12 because they don't want to execute kids under 18. And I'm  
 13 guessing that's because they figure once you're 18 you should  
 14 know the difference between right and wrong, correct?

15 A. Correct.

16 Q. And so does it matter to you what a person's age  
 17 would be as long as they're past 18 as to how they should be  
 18 punished?

19 A. That one's tricky. I'm thinking if you're 18, you  
 20 know, older than 18, you're pretty well on your own already and  
 21 you pretty well have time to think about what your life is  
 22 gonna be like. Younger than that, I don't think a child really  
 23 understands. But when you're a teen and you're out on your  
 24 own, you already know what's facing you.

25 Q. Well, the law agrees with you, because like I said,

1 you're not gonna be treated the same if you're a kid under 18  
 2 as you are. But, you know, some people say, "Well, you know,  
 3 he's only 21 or 22 or 23, 25. They shouldn't be held as  
 4 responsible as somebody who is 35 or 45 or 55." Do you agree  
 5 with that?

6 A. I don't think age has anything to do with it.

7 Q. Once you hit that maturity of 18 years old, you think  
 8 that?

9 A. Yes.

10 Q. What about how a person looks? Does that matter?  
 11 A. Oh, no. I was just thinking looks young. No, that  
 12 doesn't matter.

13 Q. Well, the reason I'm asking is look at him. That's  
 14 John Henry Ramirez. He doesn't look like a real older person  
 15 or something like that. I think the evidence is probably gonna  
 16 show he's around his mid 20s or so. Would you agree with me  
 17 that you should make a decision on his case and his punishment  
 18 based on what he did and rather than what he looks like?

19 A. You should make it on the facts, yes.

20 Q. Because we've had people come in here -- and I'm not  
 21 saying they're wrong, I'm just saying that's how they feel.  
 22 I'd say, "What's the first thing you felt when you saw him?"  
 23 And they would say, "Oh, he's so young. Oh, he's so young,"  
 24 like they were gonna -- I don't want to say -- use that as an  
 25 excuse or something. How do you feel about people that say

166

1 that?

2 A. It doesn't -- it doesn't affect me. I'm not -- you  
 3 know, I know a lot of women my age they have that mother  
 4 syndrome in them. I'm a mother but, you know, I think everyone  
 5 should be responsible.

6 Q. Don't you have like four kids?

7 A. I have four kids, yes, but my children were -- they  
 8 were working when they were 16.

9 Q. Uh-huh.

10 A. I didn't think -- you know, I wasn't gonna give them  
 11 anything more than a roof over their head, food on their table,  
 12 and clothes on their back.

13 Q. So you've made sure you watched over them and let --  
 14 taught them between right and wrong and everything, right?

15 A. Yes.

16 Q. You have a son that's, you know, pretty close in age  
 17 to him?

18 A. Uh-huh.

19 Q. Sometimes people tell me, "Every time I look at the  
 20 defendant I think of my own son that age." Is that something  
 21 that's gonna interfere with you being on this jury?

22 A. No.

23 Q. Why not?

24 A. My son's in the Navy. I've got one that's in the  
 25 Navy and I've got another one at home. I just -- like I said,

1 I'm not -- I'm not very motherly. I can't help it. I had a  
 2 family, and I love my kids, but I'm not -- I can't -- I don't  
 3 --

4 Q. I'm gonna have to disagree with you. I think you're  
 5 very motherly. The question is -- the question is, do you bend  
 6 over backwards? They call it an enabler, when you enable  
 7 somebody.

8 A. No, I don't enable anybody, not even my husband.

9 Q. Well, that's a form of love. When you're tough with  
 10 your kids and you're strict with them, that's still loving your  
 11 kids, right? That's not bending over backwards and pampering  
 12 and giving them everything they want and say everything's okay,  
 13 right?

14 A. No. I -- you know, I mean, I'm the type of person  
 15 they fell off the bike, get off and get on it again. You're  
 16 gonna ride it some day. Do it now.

17 Q. Tell me about which of your sons is in the Navy, the  
 18 31-year-old or the 25-year-old?

19 A. The 31.

20 Q. And how long has he been in the Navy?

21 A. Since he was 18.

22 Q. So he's kind of making a career out of it so far?

23 A. Yes.

24 Q. And what does he do in the Navy?

25 A. I'm not really sure. I just -- you know, when I talk

1 Q. Okay. And because -- and I'm not saying these people  
 2 are wrong, but some people told us, "Look, Mark, I believe in  
 3 the death penalty, it's a good law, I think we should have that  
 4 law. I support the death penalty." But then they have the big  
 5 but. And they'll say, "But don't make me make that decision."  
 6 And I'm just wondering about you. Can you follow through on  
 7 that decision if you think that's appropriate?

8 A. I don't have any problem with it, yes, sir.

9 Q. You don't have any problem with it. No hesitation  
 10 about it?

11 A. No.

12 Q. Okay. So you wouldn't have a problem being on this  
 13 jury and deciding whether somebody's guilty or not or what  
 14 punishment they should get?

15 A. As long as the facts are out there and it's proven,  
 16 there's no -- I don't have a problem with it.

17 Q. And that's important too, because what you're saying  
 18 is that it has to be proven to you. The judge has already told  
 19 you before lunch, remember, that right now he's presumed  
 20 innocent?

21 A. Right.

22 Q. You cannot consider him guilty at all, and the fact  
 23 is, the State has to prove the case to you and the jury beyond  
 24 a reasonable doubt. No defendant starts his case thinking he's  
 25 guilty and they have to prove he's innocent. What they have to

1 to him I just want to know how he is, you know.

2 Q. You don't really care about his work or anything?

3 A. Just as long as he works.

4 Q. No, okay. And your 25-year-old, what does he do?

5 A. He -- he's -- he's going to Del Mar. He's trying to  
 6 study criminal justice.

7 Q. What does he want to be when he grows up?

8 A. He's not sure yet. He's 25. I'm in trouble.

9 Q. Well, don't feel that bad, Ms. Gomez. It's one of  
 10 these things that sometimes kids know what they want right off  
 11 and sometimes they don't. But at least he's in school and he's  
 12 gonna try different things, I guess, too.

13 A. Yeah.

14 Q. How do you feel about being a person that would have  
 15 to make this decision? I mean, it's an awesome responsibility  
 16 that we have 12 people come over here and say, "Look, folks,  
 17 you have to decide whether somebody's guilty or not, and then  
 18 if you find them guilty, you have to decide whether they get  
 19 the death sentence or also based on the evidence." How do you  
 20 feel about you being put in that position?

21 A. I'll be honest. If someone goes out and commits a  
 22 crime and it's proven that they've done it, I think that  
 23 they've made the decision for themselves.

24 Q. Okay.

25 A. So I would have no problem.

1 do is -- the jury has to do is prove -- I'm sorry -- consider  
 2 that he's innocent and we have to prove he's guilty.

3 A. Right.

4 Q. That's America, right? That's how we started. And  
 5 that's a burden of proof on the State that we have in every  
 6 case. As the judge said, if we brought the case, we should  
 7 back it up and prove it with the facts.

8 So you think if I proved the case to you, based  
 9 on the evidence, that he should get the death penalty, can you  
 10 look at him and give him the death penalty?

11 A. Yes.

12 Q. Okay. And if you think that the evidence should be  
 13 that he should get a life sentence, can you give him a life  
 14 sentence?

15 A. Yes, sir.

16 Q. You're not leaning either way right now --

17 A. No.

18 Q. -- correct? The only thing you're leaning right now  
 19 is that he's not guilty because he has to be proven guilty,  
 20 correct?

21 A. Correct.

22 Q. And, you know, he doesn't have to testify, right?

23 A. Right.

24 Q. There's a Fifth Amendment. Sometimes there's natural  
 25 inclination for jurors to say, "Well, you know, I want to hear

1 his side of the story." If it was me, I'd want to get up there  
 2 and explain to the jury. And then some people say, "Well, you  
 3 know, I want to hear both sides." And the judge, I think, has  
 4 already told you, you may hear him testify, you may not hear  
 5 him testify. If he doesn't testify, though, you cannot hold  
 6 that against him. Do you agree with that law?

7 A. I agree with that, yes.

8 Q. Okay. So just because the fact that he doesn't  
 9 testify, that doesn't mean you can't make a decision, right?

10 A. Right.

11 Q. That just means you can't hold it against him.

12 The reason this is capital murder is because  
 13 it's murder plus a robbery. Remember it's got to be a special  
 14 kind of murder or special circumstances.

15 A. Yes, sir.

16 Q. Just because you kill somebody doesn't mean you  
 17 necessarily face the death penalty. What happens is it's not  
 18 automatic, in other words. There's only certain type of crimes  
 19 can even qualify for the death penalty. And then if it  
 20 qualifies like being one of those special crimes, do they  
 21 automatically get the death penalty?

22 A. No.

23 Q. No. And why is that? Because you go to the second  
 24 part of the trial and then you decide whether they should get  
 25 the death penalty or not. And that's what happened at the

1 Q. Uh-huh.

2 A. The one that probably got five years either turned on  
 3 the other guy or it was the first time probably he did it and  
 4 he had never been in trouble before.

5 Q. That's a very intelligent answer. That's how it  
 6 works. Because I tell people, every case is different, every  
 7 person is different. You know, maybe the first guy got 20  
 8 years because he had been to prison before for burglary. Maybe  
 9 the second guy had never been in trouble before so he got  
 10 probation. See what I'm saying?

11 A. Yes, sir.

12 Q. It's kind of a trick question because you have to  
 13 wait till you hear everything before you make a decision. Like  
 14 right now you can't look at him and say, "Well, I think it's  
 15 this because he looks like this." No, you've got to wait to  
 16 hear the evidence.

17 In the second part of the trial you might get  
 18 to hear additional evidence, and then what happens is you  
 19 answer two questions. You don't just vote, I vote for life, I  
 20 vote for death. You answer two questions. They're on the  
 21 board behind you and I'd like you to look at them with me.

22 This is presupposing the guy's been found  
 23 guilty of capital murder. The judge puts this question to  
 24 you. "Is there a probability that the defendant will commit  
 25 criminal acts of violence that would constitute a continuing

1 first trial. The first part of the trial is guilt or  
 2 innocence. Did he do it or did he not do it? Is he guilty or  
 3 is he not guilty? If he's not guilty, the case is over. If he  
 4 is guilty, though, the State goes on -- we go on to the second  
 5 part of the trial and you might get to hear additional  
 6 evidence. You might could get to hear about this guy's  
 7 background or his character. You might get to hear he's a good  
 8 guy or maybe he's a bad guy. Maybe he's been to prison ten  
 9 times before, maybe he's never been to prison. Maybe he was an  
 10 Eagle Scout, or maybe he's always been in trouble with the law.  
 11 Do you see what I'm saying?

12 A. Yes, sir.

13 Q. And I'm sure with four kids you probably, when they  
 14 were growing up, you wanted to hear all the facts and  
 15 circumstances before you made a decision on punishing them  
 16 because you want -- it's like I always tell people, nothing is  
 17 equal in this world.

18 Have you ever heard of cases like on TV or in  
 19 the newspaper where it will say one burglar -- you know, two  
 20 guys convicted of burglary. One guy gets 20 years in prison  
 21 and one gets five years probation. Sometimes people will say,  
 22 "Well, how can that be? They're both guilty of burglary." One  
 23 guy -- one guy got 20 years and one guy got five years  
 24 probation. Why would you think that would happen?

25 A. You're asking me?

1 threat to society?" We call that the future dangerousness  
 2 question. In other words, is there a chance, is there a good  
 3 chance he could hurt somebody else in the future? It doesn't  
 4 mean for sure because it's just a probability. There's no  
 5 way, unless you've got a crystal ball, that you can look in  
 6 the future that I can prove it for sure or certainty. The law  
 7 doesn't require me to. It just says it's probable.

8 The second part says, "would commit criminal  
 9 acts of violence." No, the second part in that question. It  
 10 says, "criminal acts of violence." Sometimes people say,  
 11 "Well, I can only give him the death penalty if I think he's  
 12 gonna murder somebody again or commit capital murder again."  
 13 The law doesn't say that. It just says criminal acts of  
 14 violence, which could be anything in the jury's mind. It  
 15 doesn't necessarily have to be murder.

16 And the last part I'd ask you to look at says,  
 17 "that would constitute a continuing threat to society." And  
 18 you've probably heard that before, a continuing threat to  
 19 society. What do you think that means to you?

20 A. That one stumped me. Continuing threat to society.  
 21 Would that be someone that is liable to commit a crime again no  
 22 matter what?

23 Q. That's right. It's not a trick question. What it is  
 24 is somebody's life will be a threat to our society committing  
 25 more crimes. The question I need -- the part I need to explain

1 to you is society because people keep telling me, they go,  
 2 "Well, you know, Mr. Skurka, you don't have to seek the death  
 3 penalty. You can give life in prison, and if he's locked up in  
 4 prison, he can't hurt anybody." Is that true?

5 A. That's a society of its own.

6 Q. That's exactly right. Prison is part of society. It  
 7 sounds a little funny, but, you know, some of your rights are  
 8 taken around. But in a prison, who else do you have? Other  
 9 prisoners, guards, jailers, you know, the warden, his staff,  
 10 you know, some maintenance people, whatever. In other words,  
 11 we don't put people on a desert island or completely remove  
 12 them from society so they can never ever hurt anybody. So  
 13 would you agree with me that you could still hurt somebody in  
 14 prison?

15 A. Yes.

16 Q. And you've probably heard about that happening  
 17 before, right?

18 A. Yes.

19 Q. Okay. So just being in prison doesn't lock them away  
 20 from society, right? They still have interaction with other  
 21 people. Would you agree with that?

22 A. Yes, sir.

23 Q. Okay. You answered that question yes or no based on  
 24 the evidence. Yes, he's a danger in the future, and no, he's  
 25 not. Then you go to the next question. The next question says

1 mitigating circumstances. Mitigating circumstances. The word  
 2 "mitigating" means anything that would lessen or make less  
 3 severe the punishment. In other words, he did the crime but is  
 4 there any reason to lower the sentence, give him a less severe  
 5 sentence?

6 I'm gonna give you a trick question now. I  
 7 want you to think about two burglary cases. Say you're  
 8 sitting on a jury and you have to decide the fate of two  
 9 burglars. They're both equally guilty. They both went into  
 10 somebody's house and stole something without permission.  
 11 That's burglary. But you hear the evidence and the first  
 12 burglar – and you're probably thinking, God, burglary's bad,  
 13 I'm gonna give these guys a tough sentence. But you hear the  
 14 first case. And the first case is a guy would kicked in the  
 15 back door, broke the door off the hinges, went through the  
 16 house, ransacked the house, stole money, jewelry, TVs,  
 17 stereos, VCRs, everything, okay, ripped up the whole house.  
 18 And then he got all that stuff, the loot, and went out and  
 19 bought drugs with it, traded it for drugs or bought drugs with  
 20 that stuff. And then you find out, this isn't the first time  
 21 he's been convicted of burglary. He'd been to a prison twice  
 22 before for burglary. He's like a three time loser.

23 Okay. Now switch gears and talk about a  
 24 second burglar. You're trying a case on another burglary case  
 25 and it's the same thing, he's guilty of burglary because he

1 went in somebody's house and stole something without  
 2 permission. But the facts in this case are a little different  
 3 from the first case. He did not kick in the door, he didn't  
 4 break in a window, break into the house. What he did was the  
 5 back door was unlocked and he just opened the door and went  
 6 in. That house had money, jewelry, TV, VCRs, stereos. He  
 7 didn't take any of that stuff. What he stole was a loaf of  
 8 bread and some food because he lost his job and his kids were  
 9 hungry and he needed some food to feed his kids, okay?

10 And then you hear that guy's never been in  
 11 trouble with the law before. He's never even been arrested  
 12 before. He never even got a traffic ticket before, okay?

13 A. Okay.

14 Q. That's kind of what mitigating circumstances are.  
 15 Would you treat those people the same?

16 A. No.

17 Q. No. The first one you'd probably give a higher  
 18 sentence because of the aggravating factors, and the second one  
 19 you'd probably give a less sentence because of the mitigating  
 20 circumstances. See, the fact that he didn't kick in the door,  
 21 you know, the fact that he just stole food, he didn't take  
 22 other stuff, and he had never been in trouble before. That's  
 23 an example of mitigating circumstances, see? If you start them  
 24 both equal, both guilty of burglary, they're both guilty of  
 25 burglary. But you have to wait till you hear all the

surrounding circumstances. Sometimes people call it like  
 extenuating circumstances or something like that.  
 In the first example, there was aggravating  
 circumstances. In the second example, there was mitigating  
 circumstances. Because I don't think anybody would punish  
 those guys exactly the same, right?

A. No.

Q. Because of the circumstances. And that's kind of  
 what the judge is telling you to do to answer this question.  
 Pretend that you found him guilty, you say yes. Yes, I think  
 he's a continuing threat to society. But jury, before you give  
 him the death penalty, take into consideration all of the  
 evidence, including the circumstances of the offense, like what  
 happened that day, his character and background. Is it good  
 character or is it bad character; and his personal moral  
 culpability. Is there a sufficient mitigating circumstance or  
 circumstances to warrant that a sentence of life rather than  
 death be imposed? It doesn't have to be just a mitigating  
 circumstance but it's got to be enough of a mitigating  
 circumstance to outweigh it. It's kind of like a balancing  
 test. Some people may say -- you may find out like -- "Whoa,  
 he was an Eagle Scout, or he made good grades in school, or he  
 was a decorated war hero in Desert Storm," something like that.  
 And some people say, "Well, you know, because he was a war hero  
 we're gonna give him a break and give him a less sentence."

1 Because he came from a broken home, we're gonna give him a  
 2 lesser sentence." Other people may say, "I don't care if he  
 3 came from a broken home, I don't care if he made straight As in  
 4 school, he still has to pay for what he did."

5 What I'm trying to show you it's up to the jury  
 6 whether or not to lower the sentence or not. Just because you  
 7 hear mitigating circumstances do you automatically lower the  
 8 sentence to life? No. It's up to the jury to decide. Like  
 9 going back to that burglary example. You heard some pretty  
 10 good mitigating circumstances. He just stole food for his  
 11 kids, you know. So that's what this question deals with. In  
 12 other words, you don't want to rush into a death penalty. You  
 13 want to review everything and say, "Is there any reason I  
 14 should give him life instead of death?" See what I'm saying?

15 A. Yes.

16 Q. Does that kind of make sense to you --

17 A. Yeah.

18 Q. -- that you don't want to push it and you want to  
 19 hear the evidence, and then you say, well, is there enough?  
 20 What is a mitigating circumstance is up to the jury. The judge  
 21 is not gonna say, "Well, just because he's young is definitely  
 22 a mitigating circumstance. Just because of this is a definite  
 23 mitigating circumstance." It's up to you to decide what's  
 24 mitigating. Some people may say, "Well, I don't think it's  
 25 mitigating. I think it's aggravating. Just because he's young

1 of death, that man is sentenced to die. If you answered any  
 2 other way, he gets a life sentence, okay?

3 A. Okay.

4 Q. Yes, no, death. Yes or no or any other way you  
 5 answer it is gonna be a life sentence, okay?

6 A. Okay.

7 Q. And again, you have to start out equal. You can't be  
 8 thinking one way or the other. And you're that way, right?

9 A. Uh-huh.

10 Q. A couple of legal things we need to talk about are  
 11 the fact just because he's indicted doesn't mean he's guilty;  
 12 do you remember the judge said that?

13 A. Yes.

14 Q. The charges are brought against him, but that doesn't  
 15 mean anything until the State proves the case. He has a Fifth  
 16 Amendment right to testify if he wants to but he doesn't have  
 17 to and you can't hold that against him, and you told us before  
 18 you wouldn't hold it against him.

19 The burden of proof is beyond a reasonable  
 20 doubt. That means that we have to prove the case beyond a  
 21 reasonable doubt. It doesn't mean beyond all doubt or a shadow  
 22 of a doubt or any doubt. It just says beyond a reasonable  
 23 doubt.

24 A. Yes, sir.

25 Q. Which is what I tell people is -- you know, first of

1 he's still old enough to know about better." See what I'm  
 2 saying?

3 A. Yes, sir.

4 Q. One thing the law also says is this. The law says,  
 5 "Voluntary intoxication is not a defense to crime." Voluntary  
 6 intoxication. In other words, if you go get yourself drunk or  
 7 high on drugs and you go commit a crime, is that an excuse?

8 A. No.

9 Q. No. The law says absolutely not. If you've been  
 10 drunk or high when you commit a crime, that doesn't negate your  
 11 guilt. Now, what the law does say it's a possible mitigating  
 12 circumstance. It could be a mitigating circumstance.

13 You know, say a guy gets drunk and robs a  
 14 bank. Some people may say, "Well, he robbed a bank, but, you  
 15 know, since he was drunk, we'll give him a break on that."  
 16 Other people will say, "I don't care if he was drunk. He got  
 17 himself drunk and robbed the bank so you still have to pay for  
 18 it." See what I'm saying? That's one of those things I'm  
 19 saying could be a mitigating circumstance.

20 Do you have any questions about this?

21 A. No.

22 Q. Okay. So the answer is if you find him guilty and  
 23 you answer this question yes; yes, I think he's a continuing  
 24 threat to society, and you answer no; no, there's not enough  
 25 mitigating circumstance to warrant that I give him life instead

1 all, you have to ask yourself do you have a doubt. If you  
 2 don't have a doubt, you just go ahead and vote guilty. And if  
 3 you have a doubt, ask the second question. Is it a reasonable  
 4 doubt? Do I have a reason for that doubt?

5 So then you make your mind up on that. But  
 6 there's no way I could prove it to you beyond all doubt or any  
 7 doubt unless you were a witness and you saw the thing yourself,  
 8 and you couldn't be on the jury obviously.

9 Okay. A few questions I have to ask you about.  
 10 You said you know somebody on probation but it said, "please  
 11 talk to me."

12 A. Oh, it's -- I didn't know if the juvenile court thing  
 13 had anything to do with you-all. My sister's -- it wasn't even  
 14 juvenile. I guess it was CPS or something or other. They took  
 15 her children away because she was on probation. But I have no  
 16 contact with my mother or my sister anymore. I haven't had any  
 17 for over a year.

18 Q. Is that the one where you said in your questionnaire  
 19 that your sister used drugs, and after you found that out, you  
 20 quit talking to her?

21 A. (Nodding head up and down.)

22 Q. You feel pretty strongly against drugs, right?

23 A. I feel very strongly because she has children.

24 Q. Uh-huh.

25 A. If she had made that decision before she had

1 children, I think I would have worked with her. But she had  
 2 her family and then she did the drugs and I think that's wrong.

3 Q. Sometimes people say, "Well, it's not their fault.  
 4 They have a disease, it's a medical problem. The law shouldn't  
 5 be involved in that stuff at all." How do you feel?

6 A. I don't think -- well, if you're surrounded by them,  
 7 if you grew up with people, then I think it's a disease. If  
 8 you grew with them and you think it's right. She did not grow  
 9 up with people that used drugs. She went out and looked for  
 10 them.

11 Q. So you're a little harder on somebody like that,  
 12 correct?

13 A. Yeah, if they do it by choice, yes.

14 Q. But what about people -- because I've heard of this  
 15 happen before -- some people whose parents were alcoholics are  
 16 not alcoholics because they want to go against that. They grew  
 17 up around alcoholics and they chose not to drink because they  
 18 saw what happened to their parents?

19 A. My father's an alcoholic. I can't say any of us are.  
 20 We learned that you have to hold a job, you have to work. I  
 21 mean, my father was good about making us work when we were  
 22 little. When I was young, we were farmers from daybreak to  
 23 sundown, you know, and alcohol didn't impede him, but it did  
 24 make overall life hard. And I just don't care to, you know, do  
 25 it. You know, I don't want my children to have to grow up like

1 A. Yes, sir.

2 Q. And if the evidence is such you think he is guilty,  
 3 can you vote guilty?

4 A. Yes.

5 Q. And if the evidence is such that you think that he  
 6 should get a life sentence, can you answer those questions in  
 7 such a way where he gets a life sentence?

8 A. Yes, sir.

9 Q. And if somebody brings up evidence that there might  
 10 be some mitigating circumstances, can you really fairly  
 11 consider that before you make a decision?

12 A. Yes, I can.

13 Q. It doesn't mean you have to go along with it but you  
 14 have to be open-minded to consider it and think about it first?

15 A. Yes.

16 Q. And if the evidence is in such a way that you think  
 17 this question should be answered in such that John Henry  
 18 Ramirez gets a death sentence, can you vote for that?

19 A. Yes, sir.

20 Q. And I just want somebody that cannot just talk about  
 21 it but can actually do it, if it comes to it. You think you  
 22 can do that?

23 A. Yes, sir.

24 Q. Is there any reason you couldn't be on this jury and  
 25 be fair and impartial to both sides?

1 that.

2 Q. But what you're saying, too, is you make a conscious  
 3 choice?

4 A. Yes, you make a choice. After you become a certain  
 5 age you make a conscious choice.

6 Q. Just because your dad's an alcoholic doesn't make you  
 7 automatically an alcoholic?

8 A. No.

9 Q. A person who is an adult has choices whether it's  
 10 drugs or alcohol?

11 A. Correct.

12 Q. Would you agree with that?

13 A. Yes.

14 Q. Okay. Do you think you can sit on this jury and be  
 15 fair to everybody?

16 A. Yes.

17 Q. You think you'll -- I mean, I have to ask that  
 18 question because they want to make sure you're fair, I want to  
 19 make sure you're fair, the judge wants to make sure you're  
 20 qualified, and you seem to be. I just want to double-check.  
 21 You can listen to all the evidence and make a decision based on  
 22 just the evidence?

23 A. Yes, I can.

24 Q. And if the evidence is such that you think he's not  
 25 guilty, can you vote not guilty?

1 A. No, there's not.

2 MR. SKURKA: Thank you so much for talking to  
 3 me, ma'am. I'll let the defense attorneys talk to you now.

4 VOIR DIRE EXAMINATION

5 BY MR. JONES:

6 Q. Your sister, how old is she, roughly?

7 A. Debbie, roughly, I'd say about 30.

8 Q. Thirty years old. And she has children?

9 A. Uh-huh.

10 Q. How many children does she have?

11 A. She has four.

12 Q. And what are their age range?

13 A. Let me see. I'll be honest. I can't even remember.  
 14 I think the twins, the babies are two. Emily might be five  
 15 already, and Raymond's about 12.

16 Q. Twelve?

17 A. Yeah.

18 Q. So she's got a pre-teenager?

19 A. Yes.

20 Q. Okay. Is your sister married?

21 A. No, she's not.

22 Q. Are any of the children that she has, were they born  
 23 in wedlock?

24 A. No.

25 Q. Okay. And you say that she grew up in a family where

1 this kind of behavior, that is, using drugs, was not condoned  
 2 or encouraged?

3 A. Correct.

4 Q. Okay. Which brings me to my question. And I think  
 5 most of us believe this way, that human beings, unless they're,  
 6 you know, retarded, have the power to choose. We have free  
 7 will.

8 A. Free will, yes.

9 Q. In other words, we have the power to choose one  
 10 course of action over another. Like we can choose to use drugs  
 11 or not. Or we can choose to drive our car intoxicated or not,  
 12 you know, and so forth. We can choose to -- well, you can go  
 13 on and on with that. So -- now, let's -- I'm gonna jump  
 14 forward a little bit and talk about this second special issue,  
 15 because it really kind of gets to the heart of the case, if we  
 16 get that far.

17 You told me or I heard you answer one of  
 18 Mr. Skurka's questions that if -- that if a person kills  
 19 another person -- if a person kills another person, that  
 20 they've kind of sacrificed their own life, forfeited the right  
 21 to. And I kind of got the impression when you said that that  
 22 if you found a person guilty of capital murder, that that's all  
 23 you need to know, that you would impose the death penalty no  
 24 matter what the evidence was otherwise.

25 A. I'd like to think no. It just -- it would depend,

1 room was her pimp who was there to rob the customer. That was  
 2 the purpose of taking him there. And they did, that is, the  
 3 pimp did, and it was a male. And the -- the victim resisted  
 4 the robbery, and in the course of robbery was -- I can't  
 5 remember if he was shot or stabbed. But anyway, the guy died,  
 6 okay? And the evidence also showed that the defendant was not  
 7 caught right away. About a period of a month had passed, and  
 8 during that period of month before she was arrested, she pulled  
 9 another robbery and had the pimp bring the guy to the  
 10 apartment, and this guy didn't get killed. He got -- he got  
 11 away.

12 Now, during -- she was found guilty of capital  
 13 murder, okay? And at the punishment stage of the trial, the  
 14 defense was able to prove up that when she was about 12 years  
 15 old, her mother sold her as a prostitute. Her mother was her  
 16 first pimp, okay? You're shaking your head.

17 A. It's sad.

18 Q. It's very sad. Okay. And so when the case was over  
 19 the jury answered Special Issue No. 2 yes. And when we talked  
 20 to them after the case was over, that's what they talked about.  
 21 They said that was -- that was really -- we just couldn't  
 22 believe that that happened. That was a mitigating circumstance  
 23 that caused them to want to vote a life sentence over. Also  
 24 the evidence showed this lady had a really bad criminal  
 25 history. She had been convicted of prostitution and assault

1 like I said. They forfeited their life to be free, yes. I  
 2 believe that.

3 Q. Okay.

4 A. If they're gonna spend it in jail, they made the  
 5 choice when they decided to commit the crime.

6 Q. All right. So you weren't trying to convey the idea  
 7 that you would automatically vote for the death penalty?

8 A. No.

9 Q. I mean, the legislature gave us two choices, life or  
 10 death. And so, can you conceive of a set of circumstances  
 11 where a person might be -- a life sentence might be a just  
 12 punishment in a capital murder case?

13 A. Okay. Say they went in to rob the store or  
 14 something, and someone came at them, you know, with a knife or  
 15 a gun or something, and they shot the person. At first  
 16 intention they weren't intending to kill anybody. They were  
 17 just intending to get away with, you know, whatever, products.  
 18 But when they feared for their life, they had to protect  
 19 themselves.

20 Q. Okay. Let me give you another example. This is a  
 21 real case that happened. It was a trial in this courthouse  
 22 about a year ago. It was a lady defendant and she was a  
 23 professional prostitute and had been since the time she was a  
 24 teenager. The State proved up that on the day in question that  
 25 she lured a customer to her motel room and waiting in the motel

1 and drugs and a whole bunch of stuff, okay? The lady was  
 2 like -- I forgotten how old she was -- she was in her early  
 3 30s.

4 So in that situation, you know, let's say you  
 5 had been on that jury, would you have looked at the fact that  
 6 the mother sold her as a prostitute when she was 12 years old?  
 7 Would that be a kind of a circumstance that you might  
 8 seriously consider?

9 A. Life is sad, it was sad for her, it was hard for her,  
 10 but I didn't -- I don't see where she tried to better herself  
 11 afterwards.

12 Q. Okay.

13 A. So, I guess I would have.

14 Q. So, at some point, she -- there was no reason --  
 15 well, I'm gonna interrupt my question and go back to this  
 16 Special Issue No. 2. And you wouldn't get to Special Issue No.  
 17 2 unless you had answered this first question over here yes.  
 18 In other words, you -- the jury has already found that the  
 19 defendant, because of his history or whatever, that yes, if  
 20 he's out on the street again he's likely to commit criminal  
 21 acts of violence in the future. It would be a continuing  
 22 threat to society. Now you got to Special Issue No. 2.

23 Would you read that, please, and when you get  
 24 through reading it, let me know when you're finished.  
 25 A. Okay. The one that says "the defendant"?

1 Q. Yeah, read it to yourself, and then when you finish  
 2 reading it let me know when you're finished. Can you see it  
 3 fine?

4 A. Uh-huh. Okay.

5 Q. Is there any word or phrase in that question that you  
 6 do not understand?

7 A. The personal moral culpability.

8 Q. Okay. All right. We'll get to that in a minute.  
 9 What about that -- right up at that first line, "taking into  
 10 consideration." What does it mean to consider?

11 A. To hear about it and just think about it.

12 Q. That's it. You said it. Really to consider, if I  
 13 asked you consider this, I'm asking you to think about it. But  
 14 it also -- usually when you ask somebody to consider something,  
 15 it's -- it's usually with the view that they do something.

16 A. Oh, okay.

17 Q. Okay? In other words, if you were in market for a  
 18 computer I would say, "Well, you should consider buying a  
 19 Compaq computer because it's a great machine. It's very  
 20 reliable. You should consider this machine." And when I asked  
 21 you to consider it, think about it with a view towards you  
 22 might buy it, okay?

23 Now, in this question, they ask you to consider  
 24 or think about certain things, right?

25 A. Right.

1 and shot the guy that was coming at you, that's a defense,  
 2 which goes to the question are you guilty or not guilty. So  
 3 we're not talking about is it an excuse. We're talking about  
 4 is it a factor that would cause you to want to reduce the  
 5 punishment, okay?

6 So let's go further. So what's involved with  
 7 that? To consider the defendant's character. All right. So  
 8 you think -- so this -- so -- if I say that you were a person  
 9 of good character, what does that mean?

10 A. They're honest.

11 Q. They're what?

12 A. Good character. They're honest.

13 Q. Honest. There are a lot of things it might mean. It  
 14 might mean you're honest, you're trustworthy, you're thrifty,  
 15 you're hardworking. You can probably make a whole laundry  
 16 list. You can go to the Ten Commandments, go to the Boy Scout  
 17 Law, and you can get a whole list of rules and moral conduct.  
 18 So if a person has good character, it's really how much they  
 19 adhere to that standard. A person who adheres to the standards  
 20 of moral behavior that are accepted in the community, they're  
 21 -- you say they have good character. Do you agree with that?

22 A. Yes.

23 Q. What about background? If the question asks you to  
 24 consider the defendant's background, what is that asking you to  
 25 do?

1 Q. And the first thing they ask you is to consider the  
 2 circumstances of the offense. Okay? You've already heard that  
 3 the first part of the trial, right?

4 A. Right.

5 Q. Now, sometimes I like to give this illustration. The  
 6 jury's in the box at the second stage of the trial and the --  
 7 the defendant proves up that -- that the defendant had a really  
 8 bad childhood. He was neglected and whatever. Parents didn't  
 9 let him -- didn't make him go to school, etc., etc. And so  
 10 you're listening to that and you think, well, you know what,  
 11 that's a circumstance which might cause me to want to vote for  
 12 a life sentence. The juror next to you says, "No, no, there  
 13 are lots of people who were mistreated by their parents, okay,  
 14 when they were growing up. They either didn't have parents or  
 15 the parents were bad to them or didn't make them do what they  
 16 were supposed to do, but these people don't go out and kill  
 17 people, you know. It's no excuse." Okay. What's wrong with  
 18 that argument?

19 A. Uh --

20 Q. What's wrong with it is the juror is talking about  
 21 that evidence in terms of being a defense to the crime itself,  
 22 okay? And it's not. He's correct, it's not a defense. The  
 23 fact that your parents neglected you is not a defense to a  
 24 crime as say self-defense is. In other words, if you were --  
 25 if you were confronted with deadly force and pulled out a gun

1 A. Well, when you talk about background, you talk about  
 2 his childhood again.

3 Q. That's right, his biography.

4 A. How he was brought up.

5 Q. How he was brought up. Now, have you told me that,  
 6 in your mind, it doesn't make any difference how a person was  
 7 brought up when it comes to deciding punishment?

8 A. It just -- I don't know. I mean, everybody has it  
 9 rough. It's not easy for anybody. Even rich kids have it  
 10 rough.

11 Q. Okay. Well, the law requires you to consider the  
 12 defendant's character and his background, and it doesn't say  
 13 you have to do anything with it. It just says you need to  
 14 think about it with a view toward voting for a life sentence.  
 15 And I think what I'm hearing you're saying is your personal  
 16 opinion that you can't consider that, seriously consider it as  
 17 a mitigating circumstance in a case like this?

18 A. Maybe not.

19 Q. Okay. The next one says, "personal moral  
 20 culpability." Do you remember the -- the little example that  
 21 Mr. Skurka gave you where it was a theft or burglary where one  
 22 guy came in and tore the place up --

23 A. Yes.

24 Q. -- and the other guy was stealing to -- stealing food  
 25 for his hungry kids? You're the judge. And he asks you, "Did

1 you give the two burglars the same punishment?"

2 A. Oh, that was the moral culpability. The one did it  
3 to feed his family.

4 Q. Yeah, so --

5 A. And the other one to drink, for his habits.

6 Q. They're both guilty of burglary, right?

7 A. Right.

8 Q. But I believe you said that you would, if you were  
9 setting the punishment, you wouldn't give the same punishment  
10 to each one of them, right?

11 A. Right.

12 Q. Why not?

13 A. Because one of them was trying to feed his family, he  
14 was trying to do good for his family, and he'd never had any --  
15 he'd never been in trouble before.

16 Q. Okay.

17 A. And the other one, the one that broke -- you know,  
18 forcibly broke in, had been in and out of trouble and he was  
19 feeding his habit.

20 Q. So to carry this just a little bit further, what  
21 difference does it make what the men's motive was when he broke  
22 into the house, whether to feed his kids or just to enrich  
23 himself? A crime's a crime.

24 A. A crime's a crime, but, I mean, he -- he was just  
25 doing it for his family. The other one was doing it for

1 based on the rules. Are you following me with this?

2 A. Yes, sir.

3 Q. So can you imagine some situations which might affect  
4 a person's ability to make correct choices about this? Let's  
5 take your sister. Your sister has chosen to use drugs. Is  
6 there anything going on in her life which would affect her  
7 judgment about this?

8 A. Well, she doesn't hold a job, she doesn't like to  
9 work.

10 Q. Okay. Does she have any mental health problems?

11 A. No.

12 Q. You said your father was an alcoholic?

13 A. She didn't grow up with my father. My mother  
14 divorced my dad when she was little.

15 Q. But your father's the biological father, right?

16 A. Uh-huh.

17 Q. Okay. Is there a possibility that she -- you know,  
18 they say that alcoholism has a genetic factor or an addiction,  
19 maybe it has a genetic factor. Do you think your sister might  
20 carry a bad gene in that regard?

21 A. It could be. But she's not an alcoholic so.

22 Q. Well, it could be alcohol or some other drug.

23 A. Yeah.

24 Q. If that were the case, if it were -- you were able to  
25 know that, would that be a mitigating circumstance?

1 himself and he stole things that -- you know, he really  
2 burglarized the home.

3 Q. He vandalized it, destruction?

4 A. Of money, of value. The other one just took food.

5 Q. Now, let's go back -- remember I asked you about free  
6 will?

7 A. Uh-huh.

8 Q. And we have choices to make. When you talk about  
9 moral culpability I think it requires two considerations or two  
10 -- there's really -- it has two elements. One, does the person  
11 involved, the defendant, does he know what the rules are?  
12 Okay. You know, you talk about in your family you have a  
13 strong family, and you know, your family grows up, they're  
14 taught the right values. They, you know, have contact with  
15 churches and teachers or other, you know, peers, they teach the  
16 kids what they're supposed to do so by the time they get to be  
17 18 years old they know what to do; do you agree?

18 A. Yes.

19 Q. Okay. Then the second element is, is there anything  
20 going on that would keep a person from or would affect a  
21 person's judgment about choosing the right course of action?  
22 Mr. Skurka told you that intoxication is not a defense to a  
23 crime. But it might be a mitigating circumstance which means  
24 that it might be evidence that intoxication affected a person's  
25 ability or his judgment in choosing the right course of action

1 MR. SKURKA: Judge, I'm gonna object to the  
2 question as being a commitment question.

3 THE COURT: Sustained.

4 MR. SKURKA: It should be can you consider it  
5 as a possibility.

6 THE COURT: Sustained.

7 Q. (BY MR. JONES) Your --

8 A. I could consider that -- I could consider it as a  
9 possibility but --

10 Q. Okay. Now, you say your sister -- your sister has  
11 four children, a set of twins and two others. And all of the  
12 kids were born out of wedlock and she's -- she's basically not  
13 taking care of them because she's unemployed, right?

14 A. (Nodding head up and down.)

15 Q. So let's say that that 12-year-old, you know, becomes  
16 13, 14, 15, 16, and then at the age of 17 commits a felony.  
17 He's in court and his lawyer starts proving up all the things  
18 that didn't happen in his life, or her, her own life. Would  
19 that be a mitigating circumstance for that child because of  
20 what his mother didn't do?

21 MR. SKURKA: Judge, again, I'm gonna object to  
22 him saying --

23 THE COURT: Rephrase it.

24 Q. (BY MR. JONES) Would you consider that as being  
25 possible?

1 A. It would be considered, but knowing -- knowing him  
 2 and knowing that there are -- she could have asked for help and  
 3 she didn't, or, you know, she just doesn't try to help and he's  
 4 -- he's --

5 THE COURT: Well, wait a minute though.  
 6 That's not his fault that she doesn't try to ask for help.

7 VENIREPERSON NO. 77: No, I mean, he -- given  
 8 a choice, if he asked anybody of the family -- you know, I  
 9 mean, they're trying to do right by him right now, but he's  
 10 got -- oh, nevermind. I'm getting carried away here. I'm  
 11 just saying anger issues would come to the front.

12 Q. (BY MR. JONES) What?

13 A. Anger issues.

14 Q. Okay. You're talking about the 12-year-old. Okay.  
 15 All right, I think I've gone far enough with this.

16 A. I know. I'm kind of warped.

17 Q. I know.

18 THE COURT: No, it's something we don't  
 19 normally think about. We do, but, you know, if you're not in  
 20 this business, you don't normally think about this.

21 MR. JONES: Yeah, this is the problem with --  
 22 you know, it's not that you're called upon every day to think  
 23 about this deeply.

24 Q. (BY MR. JONES) Okay. One more quick question. That  
 25 verb "to mitigate." Is there sufficient mitigating

1 A. Yes, sir.

2 Q. And the whole point on considering these mitigating  
 3 circumstances is not what you're gonna do with them before  
 4 you've heard of them. The question is would you be open-minded  
 5 and listen to those things. See what I'm saying?

6 A. Yes.

7 Q. Can you do that?

8 A. I think I can.

9 Q. Okay. It's like -- were you there that day -- do you  
 10 follow football at all?

11 A. No.

12 Q. Do you know who the Dallas Cowboys are?

13 A. Yes.

14 Q. Do you know who they played last night?

15 A. I'm not sure.

16 Q. Well, they played the Washington Redskins. And  
 17 remember that first day I told you I hate the Washington  
 18 Redskins?

19 A. I remember that.

20 Q. Now, tell me if I was on a jury and a guy walked in  
 21 who was on trial and he walked in and he sat down and the judge  
 22 said, "That guy's on trial," and he was wearing a Washington  
 23 Redskins jersey and I said, "I couldn't even consider  
 24 anything." I'm automatically gonna go for the highest sentence  
 25 because he's a Washington Redskins fan. That wouldn't be right

1 circumstances? What does the verb "to mitigate" mean?

2 A. Reason, is there a reason.

3 Q. Okay. If a circumstance is a mitigating  
 4 circumstance, what will it cause you to want to do?

5 A. Okay. If there's a reason why it shouldn't be the  
 6 death penalty then it should be life in prison, right?

7 Q. But what does the verb "to mitigate" mean? I'm not  
 8 trying to put you on the spot here, but a man's life is at  
 9 stake here and you need to convince us that you understand what  
 10 the word means.

11 A. I can't verbalize it.

12 Q. Okay.

13 A. Something to mitigate, a reason. That's what I was  
 14 thinking it was a reason.

15 MR. JONES: No further questions.

#### 16 VOIR DIRE EXAMINATION

17 BY MR. SKURKA:

18 Q. It essentially means a reason to go lower, less  
 19 severe punishment. It's a word we don't come across. But  
 20 remember what I said, mitigation means to lessen or make  
 21 lesser.

22 A. Yes.

23 Q. And you were trying to say that. You said a reason.  
 24 Is there a reason to make less. You just didn't finish that  
 25 train of thought; do you understand that?

1 of me, right?

2 A. Right.

3 Q. And that's what the defense and we're trying to  
 4 figure out is. Just because they have a reason, you can't hold  
 5 that thing against him. I mean, what if the guy who is wearing  
 6 a Washington Redskins T-shirt turns out to be like the burglar  
 7 in the second example who just stole food from his family? If  
 8 I wasn't close minded I would say, "I'm not gonna consider any  
 9 kind of mitigating circumstances because he's a Redskins fan."  
 10 But that would be wrong. I'd have to be open-minded and say,  
 11 "Okay. He's a Redskins fan, but, you know, he just stole food  
 12 for his family." Or, you know, "He didn't really break in and  
 13 he didn't have any record." See what I'm saying?

14 A. Yes, sir.

15 Q. It's kind of a trick question. So you can consider  
 16 everything, right?

17 A. (Nodding head up and down.)

18 MR. SKURKA: Okay. That's all I need you to  
 19 do. Thank you.

#### 20 VOIR DIRE EXAMINATION

21 BY THE COURT:

22 Q. It's up to the jury to decide what a mitigating  
 23 circumstance is, okay? And we can't tell you what would you  
 24 consider a mitigating circumstance. I just need to know that  
 25 you can consider them. I mean, if you -- if you -- and,

1 please, you got to tell us how you really feel. Because it  
 2 doesn't matter how you feel right now, okay?

3 A. Okay.

4 Q. You can tell us how you feel right now and it is  
 5 okay. It won't hurt any of our feelings. Here's the thing. I  
 6 need to know if you think that there's just nothing out there  
 7 -- there's no kind of mitigating circumstances that would ever  
 8 -- you would ever find sufficient to give a life sentence  
 9 rather than a death sentence -- and just wait with me. That  
 10 is, if you -- you know, I know -- I know from your answers that  
 11 you could give the defendant a fair trial on the first part of  
 12 the case, okay? You would make the State prove their case,  
 13 right?

14 A. Yes.

15 Q. Okay. That's not the issue that I'm concerned with.  
 16 The issue that I'm concerned with is, could you consider  
 17 mitigating circumstances, and -- you know, we can't tell you  
 18 what they're gonna be, but there has been suggestions of what  
 19 kind of things can be mitigating circumstances. Like a bad  
 20 childhood, like a lack of guidance. It doesn't mean that  
 21 you're gonna do it, but I need to know that these are types of  
 22 things that you can consider, okay? So I need to know if  
 23 you're gonna say, "You know what, everybody's had a hard life,  
 24 I'm just not gonna consider any." Because see, the fact of the  
 25 matter is, background is one of the things that, by law, you

1 her say.

2 THE COURT: Okay. You go right ahead. That's  
 3 why -- that's why I was concerned and that's why I followed up  
 4 with it.

5 VOIR DIRE EXAMINATION

6 BY MR. JONES:

7 Q. And keep in mind your viewpoint, there are no right  
 8 or wrong answers here. You're entitled to your viewpoint, your  
 9 feelings. But, you know, needless to say, I need you to be  
 10 honest with me as to what your feelings are because they will  
 11 affect how you will deliberate in this case.

12 You've made some pretty definitive and clear  
 13 statements that a person's background, that is, the fact that  
 14 you had a tough upbringing, you know, was neglected as a child,  
 15 etc., simply would not be something that would cause to you  
 16 want to be lenient or give a lesser punishment?

17 A. That's how I came across.

18 Q. No, you actually said it.

19 A. I tend -- yeah, I tend to be harsh, I guess. I would  
 20 consider all the evidence, I would. I would consider the  
 21 background, I would take it into consideration. I'm not -- you  
 22 know, I'm not out to kill anybody or say, you know, so.

23 Q. When you say, "you'll consider background," with a  
 24 view toward doing what?

25 A. Deciding if the crime meets the lesser punishment.

206

208

1 have to consider. That doesn't mean that you say, "Yeah,  
 2 there's sufficient mitigating circumstances at the drop of a  
 3 hat." No. This question is a question that takes a lot of  
 4 thought and careful consideration. But if you're not gonna  
 5 consider the person's background, I need to know.

6 A. I'd like to think I can, yes. I can consider the  
 7 background. I can be objective.

8 Q. Okay. Is it possible that because -- after you  
 9 consider the background, after you consider the circumstances  
 10 of the offense, after you've considered the defendant's  
 11 character; that is, is he a good guy or a bad guy, and this  
 12 personal moral culpability, that's legalese, but essentially  
 13 it's like the burglars. Remember Mr. Jones was talking about  
 14 the burglars. The one burglar was trying to feed his family,  
 15 the other burglar was just, you know, wanting to go out to  
 16 party and get high, trash the people's place. I mean, it makes  
 17 a difference. Do you not --

18 A. Yes.

19 Q. -- agree? And that's what that's saying. And so  
 20 can you consider that really, really?

21 A. I think I can, yes.

22 MR. JONES: I need to ask her some more  
 23 questions --

24 THE COURT: Go for it.

25 MR. JONES: -- because that's not what I heard

1 Q. Okay. The law says not only should you consider it  
 2 but you should fairly consider it, and I'm wondering whether  
 3 given your opinions and your feelings, that it doesn't make any  
 4 difference what a person's background is, at some point he  
 5 becomes, you know, -- I mean, you basically told me with your  
 6 own relatives here that if this 12-year-old, you know, starts  
 7 breaking the law, it doesn't make any difference that his  
 8 mother neglected him if he was so unfortunate to find himself  
 9 in a courtroom. Is that what you're telling us? If --

10 A. Well, if it was -- if he was on trial, I wouldn't be  
 11 questioned. I wouldn't be there.

12 Q. I know, you'd be biased.

13 A. No, I wouldn't -- you know, you-all wouldn't have  
 14 even considered me.

15 Q. Exactly.

16 A. Because --

17 THE COURT: Yeah, no, that's true. You'd  
 18 never make it on the jury. But that's just an example.

19 A. Yeah, I know, but it's different. You know, someone  
 20 that I have no contact with, I don't know or anything, compared  
 21 to someone that I raised as a baby.

22 Q. (BY MR. JONES) But you could be -- if you're -- I  
 23 don't even want to contemplate this, but if your nephew is on  
 24 trial and you were sitting out in the audience as an interested  
 25 family member, okay, and the defense lawyer's getting up there

1 and saying, "You-all need to go easy on this kid because his  
 2 mother neglected him and so forth." Would you -- deep down in  
 3 your heart, would you be agreeing with that?

4 A. No.

5 Q. Or you would say, "No, I wouldn't agree with it"?

6 A. I wouldn't agree with it, no. Because I was there  
 7 when they took him away.

8 MR. JONES: No further questions.

9 MR. SKURKA: Can I follow up, Judge, on just a  
 10 couple of things?

11 THE COURT: Yeah, you can follow up.

12 VOIR DIRE EXAMINATION

13 BY MR. SKURKA:

14 Q. I'm a little confused because counsel keeps asking  
 15 about your grandson (sic) and all that stuff.

16 THE COURT: Nephew.

17 Q. (BY MR. SKURKA) Nephew and all that. We're not  
 18 talking about specifically committing you to that situation. I  
 19 think what he's trying to say, in general, I mean, take out  
 20 somebody you know. In this case, you don't know John Henry  
 21 Ramirez?

22 A. No.

23 Q. You don't know what his background is, so you can't  
 24 really compare him to your loved one, your relative. And I  
 25 think that what the judge is trying to figure out is would you

210  
 1 be fairly able to consider any evidence before you act on it  
 2 about what kind of punishment he gets? Or are you gonna say,  
 3 "Well, I'm not gonna be satisfied with this," and make up your  
 4 mind before you even hear anything?

5 A. No, like I said, I think I can be fair. I'd like to  
 6 think I am, you know, given the opportunity. But, you know,  
 7 it's up to you-all.

8 Q. Will you listen to any evidence they may put on that  
 9 shows that he might be worth giving a chance to, give him a  
 10 life sentence?

11 A. Yes.

12 Q. Okay. You haven't closed your mind to that, have  
 13 you?

14 A. No.

15 Q. Okay. Well, see, do you understand his point of  
 16 view?

17 A. I understand his point of view.

18 Q. Will you listen to that stuff?

19 A. I will listen to it and I can consider it.

20 Q. You can consider it?

21 A. Yes.

22 Q. No matter what it is?

23 A. Yes, sir.

24 MR. SKURKA: Thank you, ma'am.

25 VENIREPERSON NO. 77: Can I go?

1 MR. JONES: Yeah, I'm finished.

2 THE COURT: Why don't you wait in the jury  
 3 room. Let me talk to the lawyers.

4 MR. JONES: I'm sorry. I should have told you  
 5 I finished.

6 (Venireperson exits courtroom.)

7 MR. JONES: Your Honor, we move to strike this  
 8 juror for cause because given from the totality of her  
 9 answers, I do not think that she can fairly consider with a  
 10 view towards giving a life sentence the defendant's  
 11 background. And the defense, in a capital murder case, is  
 12 required by the Constitution of the Supreme Court to prove up  
 13 that background, especially if it's bad background, and to  
 14 argue to the jury that they should consider it as a mitigating  
 15 circumstance.

16 Her personal viewpoint is, is that it doesn't  
 17 make a difference what your background is, bad or good. At  
 18 some point, it can't be argued in her mind to be a reason for  
 19 showing leniency and that's just the way she feels. And I  
 20 think if the Court even has a doubt about this, that that  
 21 doubt ought to be resolved in favor of the defendant. But she  
 22 made a really clear answer the first time I asked her that  
 23 question when I asked her, "Do you think you could consider  
 24 that with a view toward, you know, giving a life sentence?"  
 25 And she says, "I don't think I can," you know. And her

1 statements about her sister and her nephew, put those two  
 2 together --

3 THE COURT: Except that -- except that -- and  
 4 I'm -- I'm on the fence with agreeing with you on the first  
 5 part of it. You didn't press her -- I mean, there may be  
 6 other reasons why she, on her nephew's case, feels  
 7 differently. I mean, it may very well be that the rest of the  
 8 family has jumped in and is raising that kid. Nobody's  
 9 explored that. And maybe that's her motivation. Maybe --

10 MR. JONES: I don't know.

11 THE COURT: We didn't explore that. But it  
 12 may very well be that, you know, she has jumped in and has  
 13 taken a motherly role with that child, or somebody else in the  
 14 family, and that's why she feels that way about that  
 15 situation. But I -- I -- but I -- I see where you're coming  
 16 from because although she does say she can consider everything  
 17 when I press her, it doesn't really feel that way, Mr. Skurka.

18 MR. SKURKA: All I can do, Judge, is  
 19 respectfully disagree with Mr. Jones' assessment of the  
 20 witness. The juror basically said, "I can consider these  
 21 things." Now, when Mr. Jones pressed her about this bad  
 22 background, there was too much -- in my opinion, too much  
 23 thoughts about the background she knew about with this young  
 24 man, this nephew of everything. And she said, "I have a hard  
 25 time excusing that because I know his background," the

1 nephew's and --

2 THE COURT: Exactly.

3 MR. SKURKA: -- that's completely different  
4 from this.

5 THE COURT: I'm not considering the nephew  
6 thing because no one asked her, "Why do you feel that way?  
7 Why don't you feel that that should be a factor?" Maybe the  
8 -- maybe someone else in the family has picked up the slack  
9 and doing everything that a parent should do. We don't know.  
10 But no one asked. But I got the feeling that she thinks she  
11 can be fair.

12 MR. JONES: That's another thing, she  
13 qualified her answer, "I think I can do it."

14 THE COURT: Which many people do. A lot of --  
15 we don't like that, okay? We don't -- we call it qualifying  
16 our answer. And when you ask a juror many times, they'll say,  
17 "What do you mean?" Because when they say, "I think so," that  
18 means to them yes. But nonetheless, I got -- you know, this  
19 is a death penalty case, and I just -- I can't take the chance  
20 on this, Mr. Skurka. I just think -- I'm gonna grant the  
21 challenge for cause. I just -- I mean, I -- I think you may  
22 be technically right, but with so much on line, I just don't  
23 think I can go with you on this one.

24 MR. SKURKA: As long as you say I'm  
25 technically right, Judge.

1 disqualify themselves pretty fast.

2 THE COURT: Okay.

3 MR. SKURKA: But the next one specifically, I  
4 think.

5 THE COURT: Why do you think the next one?  
6 MR. SKURKA: Judge, it's religious reasons,  
7 79. She has religious reasons, says every life is sacred and  
8 she talks about religion quite a bit.

9 THE COURT: Okay. We'll hold for now.

10 MR. SKURKA: And then the same thing with No.  
11 81, she says she's leaning toward a life sentence.

12 THE COURT: Okay.

13 MR. SKURKA: And she answered certain  
14 questions. I mean, I'm gonna talk to her about those first.

15 THE COURT: But you think the rest of them --

16 MR. SKURKA: Are possible selections except  
17 for No. 82. That's another one that has a religious problems.

18 THE COURT: Yeah, but we've got six more.

19 MR. SKURKA: She says she's very nervous about  
20 it. She's a Sunday school teacher. I think those persons are  
21 a chance that they may not qualify.

22 THE COURT: Okay. Here's where we are. Right  
23 now there's two people here that have probably just been here  
24 a half hour. I really don't mind sending either of those  
25 folks home at this point. I don't really feel bad about it.

1 THE COURT: I think you may be technically  
2 right, Mr. Skurka.

3 MR. SKURKA: I'm not gonna argue with the  
4 Court.

5 THE COURT: But I've got to feel -- I got to  
6 feel and I just -- that's, you know, how I see it. So let's  
7 bring her in.

8 (Venireperson enters courtroom.)

9 THE COURT: All right. Ms. Guerrero, you were  
10 not selected to be on this jury but we do appreciate you  
11 spending a good part of your day with us, mostly waiting in  
12 the jury room, and we're sorry about that. If you need a work  
13 excuse, we can get that for you. Thank you very much for your  
14 time, ma'am.

15 (Venireperson exits courtroom.)

16 MR. JONES: This is absolutely irrelevant, but  
17 based on the information from her questionnaire --

18 THE COURT: Are we off the record?

19 MR. JONES: Yeah, we're off the record.

20 (Discussion off the record.)

21 THE COURT: All right. How far do you think  
22 we're gonna get today, gentlemen, realistically? We've got  
23 six more people.

24 MR. GARZA: About three.

25 MR. SKURKA: Well, some of the next ones may

1 I'm not sure I want to leave them here another two hours and  
2 then send them home.

3 MR. GARZA: If you send two home, how many do  
4 you have left?

5 THE COURT: Well we've got six. Even if we  
6 sent two home, we still have four.

7 MR. JONES: I'd send two home.

8 THE COURT: Yeah, I'm thinking that. We've  
9 done one. We've got six people left here.

10 THE COURT MANAGER: Six or five?

11 MR. SKURKA: Well, we have six. But like I  
12 said, I think three of them are gonna be disqualified pretty  
13 quick.

14 THE COURT: Well, do you want to take those  
15 people first? The next one's 79. We'll obviously take 79.

16 79. Who else?

17 We got to do 49 today. Because 49's already  
18 been rescheduled once.

19 MR. SKURKA: That because they rescheduled it.

20 THE COURT: No, it's because we had the Tinker  
21 thing.

22 MR. SKURKA: 49 couldn't come on Friday.

23 THE COURT: 49 couldn't come on Friday, so we  
24 got to get that one done today for sure. Okay. Well, I guess  
25 let's take a little bitty break and then we'll -- let's start

1 taking these folks that you think -- I mean, if that's okay by  
 2 the defense, that you think may disqualify themselves. If  
 3 we're gonna get there --

4 MR. JONES: If there's some matter upon which  
 5 we think they're gonna disqualify, we ought to get it right --

6 MR. SKURKA: That's what I was gonna say. I  
 7 may get in and be through in five minutes.

8 THE COURT: Yeah, okay. Let's do that. Let's  
 9 go through those ones that we think may disqualify themselves,  
 10 and then once we go through those folks, then we'll get a real  
 11 good idea of how -- how we should handle this situation.

12 MR. SKURKA: You got it, Judge.

13 (Recess.)

14 THE COURT: Where are we at? Tell me which  
 15 ones you think? 79 you think may have a problem?

16 MR. SKURKA: 79, 81 and 80.

17 THE COURT: Let's call 79. Let's get 79 in  
 18 here and see what is going on.

19 Let's bring in 79, that is, Tina Torrez.

20 (Venireperson enters courtroom.)

21 THE COURT: All right. Come forward. You are  
 22 Tina Torrez?

23 VENIREPERSON NO. 79: Yes, sir.

24 THE COURT: All right.

25

1 Q. Now, some people say, "I believe in the death penalty  
 2 in some cases, and I think it's an okay law." Others say they  
 3 don't like it and they would never vote for it. My question to  
 4 you is this: Is this something that you cannot participate in  
 5 because of your beliefs or whatever? I mean, and at this  
 6 point, there is no right or wrong answers, okay?

7 A. Okay.

8 Q. I don't want you to answer the question because you  
 9 want -- the way I want to hear it or the way anybody here wants  
 10 to hear it. I want to know really, really how you feel, okay?

11 A. Okay. Depending on the circumstances, I think I  
 12 would be able to be objective and go either way depending on  
 13 the information I'm given.

14 Q. Okay. All right. Well, let's talk about that. In  
 15 every criminal case, the burden is on the State of Texas to  
 16 prove the case, all right? Let's see here. You've never been  
 17 on a jury before. That's okay. It's on the State. They  
 18 brought -- the law says, "You bring the charges, you prove the  
 19 charges." Okay? You agree with that, you follow that law?

20 A. Uh-huh.

21 Q. As part of that, the defendant is presumed to be  
 22 innocent.

23 A. Okay.

24 Q. Okay. And if you had to vote right now, you'd have  
 25 to vote not guilty, right, because he's innocent until proven

1 VENIREPERSON NO. 79,  
 2 TINA TORREZ,  
 3 VOIR DIRE EXAMINATION

4 BY THE COURT:

5 Q. We're trying to pick a capital murder jury here,  
 6 okay?

7 A. Okay.

8 Q. So we need to talk to you about some things, okay? I  
 9 know you've been waiting and I'm sorry about that.

10 A. It's okay.

11 Q. Okay. Now, you have -- you've given some answers in  
 12 your questionnaire. You say every life is sacred beyond any  
 13 doubt to the best argument for and against the death penalty.  
 14 And, I guess, really, my question is this: This is a capital  
 15 murder case. And what is that? That's a murder, an  
 16 intentional taking of the life of another, plus something else.  
 17 And because it's plus something else it makes it capital. In  
 18 this case, the State is alleging that the defendant attempted  
 19 to or robbed the victim, and then in the process, murdered the  
 20 person, okay? Do you follow me?

21 A. Yes, sir.

22 Q. Okay. The significance of that is that -- and the  
 23 significant part about capital is that means that the death  
 24 penalty is a possibility, and you know that from the other day?

25 A. Yes, sir.

1 guilty. Do you agree with that law?

2 A. Yes.

3 Q. Can you follow that law?

4 A. Uh-huh.

5 Q. All right. The burden of proof is beyond a  
 6 reasonable doubt. There's no definition, okay, but it's the  
 7 highest burden that we have in all of the law, okay?

8 A. Okay.

9 Q. It is not beyond all doubt, it is not beyond a shadow  
 10 of a doubt, but it's higher than all the other burdens that we  
 11 have. There's a 51 percent rule sort of preponderance of the  
 12 evidence. We use that in civil cases. There's a higher burden  
 13 called clear and convincing. We use that in cases where the  
 14 State's trying to remove children, okay? Clear and convincing  
 15 sounds pretty high, right? This is higher.

16 A. Okay.

17 Q. It's kind of weird, but I sort of define to jurors  
 18 what beyond a reasonable doubt is by telling them what it's  
 19 not.

20 A. Okay.

21 Q. Okay? Now, the defendant doesn't have to testify.  
 22 The Constitution says that. And it really makes sense because  
 23 if the State has the burden of proof, then don't have to do  
 24 anything, right?

25 A. Right.

1 Q. And if that's the case, then he doesn't have to  
 2 testify. Now, it's even stronger than that. Not only does he  
 3 not have to testify, but the jury can't go back there and say,  
 4 "You know what, he didn't testify, I have to hear both sides of  
 5 the story before I make a decision so I'm gonna -- I'm gonna  
 6 put this one for the State." You can't do that, okay? I need  
 7 to know if you would -- if you will follow the law and not hold  
 8 it against the defendant if he chose not to testify, or would  
 9 you hold it against him?

10 A. I wouldn't hold it against him.

11 Q. Okay. We talked a little bit about capital murder,  
 12 what capital murder is. And this is how a jury trial works in  
 13 Texas. You have the guilt or innocence phase, okay? The State  
 14 has to prove to you beyond a reasonable doubt defendant's  
 15 guilty of capital murder. And he has to prove all of the  
 16 elements, the murder while in the course of committing the  
 17 robbery, or attempted robbery, that is, you know, if I came and  
 18 I tried to rob you. What's robbery? Well, you know, the  
 19 forcible taking of something from another, or maybe even by  
 20 threats. If I came and pointed a gun at you and I said, "Give  
 21 me your purse," and you gave it to me, that's a robbery. If I  
 22 -- if I came and did that and you happened to have a bowling  
 23 ball in there because it's really a bowling deal and you hit me  
 24 over the head with it and knocked me out, am I guilty of  
 25 robbery? No, but I'm guilty of attempted robbery. And -- and

1 to a \$10,000 fine. The jury would write like a number. They'd  
 2 say like 25 years or 50 years, or maybe they'd say five years  
 3 and probation. And then for the blank for the fine they might  
 4 put a fine, maybe not. We don't do that here. You answer  
 5 questions. Here's the first one.

6 "Is there a probability the defendant would  
 7 commit criminal acts of violence that would constitute a  
 8 continuing threat to society?" What does that mean? Will the  
 9 defendant probably be violent to other people. Do you think  
 10 so? And the jury would answer yes or no, okay?

11 A. Okay.

12 Q. Then they go to the second question. "After taking  
 13 into consideration all of the evidence, including the  
 14 circumstances of the offense." That's the first part of the  
 15 case, right? Remember the guilt or innocence?

16 A. Right.

17 Q. -- "the defendant's character and background" --  
 18 what's that? Well, what's character? Well, it's kind of the  
 19 person you are. Are you a nice guy, you're not a nice guy? Do  
 20 you live by a moral code, are you honest, you know, that kind  
 21 of stuff.

22 A. Okay.

23 Q. His background. What's that? Well, you know, how  
 24 did he grow up? Was he abused as a child or did he have a  
 25 great upbringing. Do you follow me?

1 in this situation, if they can prove an attempted robbery,  
 2 that's good enough. Do you follow me?

3 A. Yes, sir.

4 Q. Okay. But they have to prove it nonetheless. And  
 5 the law says they have to prove all the elements of capital  
 6 murder. They don't just get nine out of ten or 11 out of 12 or  
 7 whatever it is. They have to run the table. Would you make  
 8 them do that?

9 A. (Nodding head up and down.)

10 Q. Yes?

11 A. Yes, sir.

12 Q. Okay. Now, like I told you, there's two parts.

13 That's the guilt or innocence phase. If the defendant's found  
 14 not guilty, that's the end of the case. If the defendant's  
 15 found guilty, we go on to part two. What's part two? Part two  
 16 is the punishment phase. In a capital murder case, if the  
 17 defendant is found guilty, there's only two things that can  
 18 happen, life in prison or death penalty. Both are pretty  
 19 serious, both pretty severe punishments, okay?

20 A. Yes, sir.

21 Q. But we don't say life or death. The jury doesn't go  
 22 back and write a little blank life or death, okay, like they  
 23 would in every other kind of case. Let's say this was a  
 24 regular murder and the jury was supposed to go back and assess  
 25 punishment. The punishment range is five to 99 or life and up

1 A. Yes, sir.

2 Q. And then, "the personal moral culpability of the  
 3 defendant." Well, I mean, it kind of fits in with -- with the  
 4 circumstances of the offense in that. There's an example  
 5 that's given, that we've been given about two burglars, both  
 6 found guilty. One of them just walked into a house because his  
 7 family was starving and he took a loaf of bread and some food.  
 8 The other one, he just wanted to go party with his friends, he  
 9 broke in and stole a bunch of TVs and sold them, and they went  
 10 out and got high. Why? Because he just wanted to. And he had  
 11 been in trouble a bunch of times before for burglary. The  
 12 personal moral culpability of those two people are not the  
 13 same, correct?

14 A. Correct.

15 Q. And that's what that's all about, what's their  
 16 personal moral culpability. And then, "Is there sufficient  
 17 mitigating circumstance or circumstances to warrant a sentence  
 18 of life imprisonment rather than the death sentence be  
 19 imposed?" Okay. Should they get life or death? What -- what  
 20 causes that -- the jury to vote that way? Mitigating  
 21 circumstances. Well what's that? Mitigating means to lessen  
 22 circumstances like, I don't know, maybe he was a great guy,  
 23 maybe he did community service, taught little kids how to read  
 24 that couldn't read, you know. And maybe you think, that's a  
 25 mitigating circumstance because, you know, this particular day

1 was completely out of character for him. And I'm not excusing  
 2 him for it. We found him guilty and he's gonna get life or  
 3 death. Those are both serious punishments, but maybe these  
 4 mitigating circumstances are sufficient to warrant life rather  
 5 than death, okay? Maybe there's -- maybe you think, hey, that  
 6 is a mitigating circumstance but it's not sufficient to warrant  
 7 life rather than death because of all these other factors.

8 Okay?

9 A. Okay.

10 Q. And that's what the jury would have to weigh and the  
 11 jury would have to answer yes or no.

12 Okay. Now, at the beginning of the trial I  
 13 have to swear the jury in and I say, "Do you solemnly swear  
 14 you will render a true verdict based on the law and evidence  
 15 presented to you?" And the jury says yes or no, right?

16 A. Right.

17 Q. I need to know from you, can you take the oath on the  
 18 guilt or innocence and give this man a fair trial to see if  
 19 they can prove their evidence beyond a reasonable doubt?

20 A. I believe so, yes.

21 Q. Based upon the law and the evidence presented to you?

22 A. Yes.

23 Q. Okay. Now, this second part's harder because some  
 24 people tell me, "I cannot participate in a process that may  
 25 lead to someone's death. I can't answer your questions

1 just want to let you know, it's okay to say something that may  
 2 go against what you think that we want to hear. We just need  
 3 to know how you feel, okay?

4 A. Okay.

5 Q. In other words, it's just as okay to say you can't  
 6 serve on this kind of case as it is to say you can serve on  
 7 this kind of case, okay?

8 A. Okay.

9 Q. Now, saying all that, I want to talk about some of  
 10 the main issues in this case. The judge has hit on a few  
 11 things but I want to go into a little more detail. For  
 12 example, the first big issue, of course, in this case is the  
 13 death penalty. If the defendant is found guilty, you might be  
 14 put in a position where you would have to vote in such a way  
 15 that he would get the death penalty. How did you feel about  
 16 being put in that position? Do you remember that first day we  
 17 had two or 300 people in there and you probably didn't know  
 18 what kind of case it was until Judge Galvan came down and said,  
 19 "Folks, this is a criminal case." And some people probably  
 20 said, "Oh, it's gonna be a burglary case or a DWI case or  
 21 whatever." And then the judge hit you over the head with it  
 22 and said, "Not only that, it's gonna be the highest kind of  
 23 criminal case. In fact, it's a capital murder case and this  
 24 person right here is on trial and you may have to give them the  
 25 death penalty, if the law and evidence warrants that."

1 because I can't do that." That's me. Or others tell me, "This  
 2 is nonsense. I will figure out a way to vote -- if I find him  
 3 guilty, I'm gonna figure out a way to vote for death. I don't  
 4 care about this other stuff. I'm not gonna follow the law."  
 5 Both sides can't follow the law. If you can't, it's okay.  
 6 We'll get somebody else, okay? I need to know from you, can  
 7 you follow this law and answer these questions?

8 A. I believe I can, yes, sir.

9 THE COURT: Okay. All right. Mr. Skurka.

10 MR. SKURKA: Thank you, Judge.

11 VOIR DIRE EXAMINATION

12 BY MR. SKURKA:

13 Q. Hello, Ms. Torrez, my name is Mark Skurka, I'm an  
 14 assistant district attorney, along with Geordie Schimmel.  
 15 We'll be the ones presenting the case to you if you're selected  
 16 on the jury. I want to start off by telling you there's no  
 17 right or wrong answers to anything. All that means is don't  
 18 answer in a certain way that you think the judge wants to hear  
 19 you say it or I want to hear you say, or as the defense wants  
 20 to hear you say it. We just want to know what your feelings  
 21 are about some of the issues in this case. The important thing  
 22 as a juror, though, is some people think, well, it's my civic  
 23 duty, I have to sit on a jury. But sometimes people try to sit  
 24 on a jury even though it might not be that kind of case that  
 25 they would be a good juror on or qualified to sit on. So I

1 Tell me how you felt about being put in that  
 2 position? What was your first reaction when you heard it was  
 3 that kind of case?

4 A. My first reaction was that I really didn't have a  
 5 clear set opinion on anything. It's not something I'm familiar  
 6 with or informed about. So I guess my first was uncertainty  
 7 because I really didn't know enough about it.

8 Q. And that's a fair thing. Some people, you know, have  
 9 given a lot of thought to this and some people haven't.

10 A. Right.

11 Q. And we've had people before say, "I've never really  
 12 thought about it. I never thought I was gonna be in that  
 13 position." And sometimes people say, "Well, I used to feel  
 14 this way and now, as I get older, I feel this way about the  
 15 death penalty." I'm just curious about you, when once you got  
 16 over that initial thing like you didn't have a clear set  
 17 opinion, or it was a little uncertainty, how did you feel after  
 18 that knowing that, I mean, here you are today to see if you're  
 19 qualified? Has that changed? How do you feel about it now?

20 A. I feel that everyone deserves for you to have an open  
 21 mind. You can't go into something and have your mind already  
 22 made up because that's not fair.

23 Q. Well, that -- that's good and well, but let's talk  
 24 about the death penalty. I told you the very first day --

25 A. Right.

1 Q. -- that the State is gonna ask for the death penalty  
 2 in this case. I don't like to blind side people and sandbag  
 3 them and stuff, but I just want to know. But I also want to  
 4 know -- and some people tell me, "You know, I do believe in the  
 5 death penalty, Mark, it's a good law. I think it's good and I  
 6 think we should have it in Texas, but I don't think I could  
 7 carry it out. I don't think I could be the one to do it, you  
 8 know." And there's nothing wrong with that. It's just, you  
 9 know, we just need to know how you feel. And I want you to  
 10 look at the guy. That's him right there, that's John Henry  
 11 Ramirez, not somebody on the news or in the paper somewhere.  
 12 That's him. How do you feel about being put in that position  
 13 where you might have to make that kind of decision about  
 14 whether that man lives or dies?

15 A. I mean, I -- nervous, I mean, because everyone --  
 16 you've got to keep an open mind, base your information on the  
 17 facts that you're given.

18 Q. Why do you feel nervous?

19 A. Because I feel -- you know, you're -- I'm sitting up  
 20 here and everyone's staring and you get nervous.

21 Q. I know. I'm talking about nervous about making the  
 22 decision?

23 A. Because it's a big decision.

24 Q. Right. And that's what I'm saying. Some people  
 25 would say, "Put me on a DWI case, put me on a shoplifting case,

230  
 1 put me on a burglary case, but Judge, I don't know if I can sit  
 2 on this kind of case because I don't know if I feel -- I could  
 3 be responsible for making that decision on whether a person  
 4 lives or dies." How do you react to that?

5 A. I don't know how to answer. I mean, I think everyone  
 6 deserves the right to be -- you know, the evidence be presented  
 7 and you decide. And it's not fair just because I might be  
 8 nervous or afraid, you know. What if everybody -- what if all  
 9 150 feel that way and it's not fair that somebody doesn't get a  
 10 fair trial because everyone's nervous.

11 Q. Okay. You're missing -- what I'm trying to get at is  
 12 this. It's okay to be nervous.

13 A. Right.

14 Q. I don't think anybody wants to be excited about  
 15 sitting on this trial and making that decision. But push on  
 16 come to shove, say you're on this jury and the judge tells you  
 17 have to listen to the evidence and make some decisions, and  
 18 those decisions might lead to somebody's life being taken away.  
 19 How do you feel about you, Tina Torrez, participating in that  
 20 kind of decision?

21 A. I think I could do it. I mean, it's not something I  
 22 would want to do, but --

23 THE COURT: If you or a family member were  
 24 sitting over there in that chair as a defendant, would you  
 25 want somebody like you as a juror in this case?

1 PROSPECTIVE JUROR NO. 79: I think so.  
 2 THE COURT: All right. Go ahead.  
 3 Q. (BY MR. SKURKA) When we talk about the death penalty  
 4 -- and that's why I made you look at him because we're not  
 5 talking about something in a vacuum or somebody talking about  
 6 it in a coffee shop. I mean, that's a real life person. If  
 7 you feel that way fine. If you don't, you don't, but some  
 8 people would say like, "I can't sit on that type of jury. I  
 9 can sit on another kind of jury. But just being responsible  
 10 for somebody's life or death, you know, I may not be able to  
 11 sleep at night. I may have a hard time struggling myself, or I  
 12 may vote one way because I'd be nervous about coming up there  
 13 and having that, you know, weigh on my mind." How does that  
 14 strike you or do you have any reaction to that?

15 A. I'm sorry. I don't understand.

16 Q. Well, what I'm saying is making that kind of  
 17 decision. Some people say, "Well, because of my religion or  
 18 ethical concerns, I may make a decision and it will weigh so  
 19 heavily on me it's gonna affect me that I'm the one, along with  
 20 my jury, is responsible for sending somebody to die." Is that  
 21 gonna have an effect on you, if you had to vote that way  
 22 because of the evidence?

23 A. I don't -- I mean, I don't think so. I don't know.  
 24 I don't think it would affect me in a way where I wouldn't be  
 25 able to sleep or anything.

1 Q. Well, in your questionnaire you said that every life  
 2 is sacred.

3 A. Right. But you have to look at it on both sides. If  
 4 I --

5 Q. Explain.

6 A. Well, I don't know the story. I don't know what  
 7 happened. Somebody was murdered. Their life was sacred, but  
 8 his life is sacred also. Depending on the circumstances, if I  
 9 have to make a choice that, yes, this deserves this or that, I  
 10 think I can do that. I'm not gonna let it keep me up nights or  
 11 make myself sick about it. I'm going to look at the facts and  
 12 base it on that, the information that I'm given and base it on  
 13 that. I'm not gonna say, yes, because it's making me feel bad,  
 14 or I can't sleep, or say no because of the same thing.

15 Q. Let me give you an example.

16 A. Okay.

17 Q. My wife loves animals. And one day we were driving  
 18 down the street, I'm off the highway somewhere, and I  
 19 accidentally hit a cat in the car. And the cat was very, very  
 20 injured. And we stopped the car and went over to the side and  
 21 it was clear the cat was suffering really bad. And my wife  
 22 knew that she had to make a decision about putting this cat's,  
 23 you know, life at the end and end this cat's life. And she  
 24 knew that, you know, in her mind, but in her heart, she just  
 25 couldn't put the cat out of its misery. And there's nothing

1 wrong with that, you know. She's just believes in that stuff.  
 2 But even though she knew that was a decision, she couldn't do  
 3 it. She couldn't follow through on that. And sometimes jurors  
 4 say the same thing. They'll say, "Look, you know, I believe in  
 5 the death penalty, I can follow the law, but I just can't  
 6 follow through with it knowing that I'm gonna be responsible  
 7 with the jury on sending somebody to death." Do you feel that  
 8 way?

9 A. I think I would be able to make a decision.

10 Q. Okay. Why do you think that?

11 A. Because I had to make a decision when my mother was  
 12 ill, and it was something that would have to affect my family.  
 13 So it wasn't something I wanted to do but I knew it was  
 14 something I had to do.

15 Q. So what you're saying is, was it some kind of thing  
 16 that maybe you had to make a decision whether she, you know,  
 17 continues on the machines or not?

18 A. Uh-huh.

19 Q. That's a very tough decision. But, of course, you  
 20 made that decision because it's someone you love, and you  
 21 thought that would be better for them in the long run, right?

22 A. Right.

23 Q. Well, of course, in this guy's decision, you know,  
 24 sentencing him to death wouldn't make it better in the long  
 25 run. It would take him from the face of the earth. Is that

1 do, and it's something we just started, so I know -- I believe  
 2 they're against it but I really -- it's not something we've  
 3 talked about in any of the classes I've been in.

4 Q. That was my next part. My follow up is because most  
 5 people will say the Catholic church is against the death  
 6 penalty and you're studying to be a Catholic, is that gonna  
 7 affect you --

8 A. I --

9 Q. Let me finish the question.

10 A. Okay.

11 Q. Do you see where I'm coming from?

12 A. Yes, sir.

13 Q. Is it gonna affect you if you're sitting here and you  
 14 get on the jury, and at your next class they tell you, "Well,  
 15 it's against the death penalty," and the next thing you know  
 16 you're sitting here and you're thinking, "Oh, gosh, this is  
 17 gonna be dilemma for me because the Catholic church, which I'm  
 18 trying to become a part of, is against the death penalty," and  
 19 it's gonna put you in a bad, you know, circumstance or bad  
 20 position. Can you respond to that?

21 A. I don't think it would affect me because there are --  
 22 like I said, I'm taking the classes but there are a lot of  
 23 things that the Catholic church believes in and follows that I  
 24 don't agree with.

25 Q. Okay. So even if the Catholic faith was against the

1 gonna affect you knowing it's somebody like that, that you're  
 2 not doing it to help them, but you're doing it to punish them?

3 A. I don't think so. Because it's not like we're -- I  
 4 would be purposely doing it to punish him. The decision's made  
 5 based on -- how do I explain it?

6 Q. That's not to punish somebody, by giving them the  
 7 death sentence? You lost me on that one.

8 A. Well, not like I'm intent on punishing him. Like the  
 9 -- how do I explain it?

10 THE COURT: Based on facts and circumstances.

11 VENIREPERSON NO. 79: Right.

12 Q. (BY MR. SKURKA) And I understand it's gonna be based  
 13 on facts and circumstances, but it does punish him, does it  
 14 not?

15 A. Yes.

16 Q. Okay. Tell me about -- you say you're studying to be  
 17 a Catholic, correct?

18 A. To make my confirmation and my first communion.

19 Q. Well, congratulations.

20 A. Thank you.

21 Q. What about the Catholic church? Do you know -- do  
 22 you do not know what the Catholic church feels about the death  
 23 penalty or how they feel?

24 A. To be honest, not really. I mean, I'm taking the  
 25 classes because it's something that my grandmother wants me to

1 death penalty, that wouldn't bother you in voting for it  
 2 knowing that it would go against their teachings?

3 A. I don't think it would.

4 Q. All right. Tell me about who your aunt is that's in  
 5 Legal Aid. Who is that?

6 A. Irma Torres McGregor.

7 Q. Irma Torres McGregor. Does she work here at the  
 8 courthouse?

9 A. Uh-huh, yes, sir.

10 THE COURT: She does the protective orders.

11 MR. SKURKA: She does the protective orders?

12 THE COURT: She's in here all the time.

13 Q. (BY MR. SKURKA) Tell me about the situation with your  
 14 brother having a problem with drugs. And I don't mean to pry  
 15 but --

16 A. No, I understand.

17 Q. -- I just kind of need to know what's going on. Can  
 18 you tell me a little bit about that?

19 A. He was involved with the wrong crowd and got, I think  
 20 it's several different charges against him. And I know he was  
 21 in jail in San Antonio and he's been in and out of rehabs and  
 22 out of jail.

23 Q. Is that the one you said also was at Charlie's Place

24 --

25 A. Yes.

1 Q. -- for a while too?

2 A. Uh-huh.

3 Q. So was he in jail here and in San Antonio or just San  
4 Antonio?

5 A. He was here and they sent him -- he was in Kerrville  
6 -- no, Karnes City, and then from there, he was in San  
7 Dominguez I believe it was, and then he was released from there  
8 and that's when he was in Charlie's Place.

9 Q. So he was actually in prison, right? I mean --

10 A. I don't know what the difference is.

11 Q. Well, generally speaking, the difference is the jail  
12 is the one where you sentence your time for misdemeanors and  
13 prison is when you serve your sentence for felonies.

14 A. Okay.

15 Q. Was it a felony case or a misdemeanor case, do you  
16 know?

17 A. I think it was a felony.

18 Q. All right. What kind of drug was it involved, if you  
19 don't mind me asking?

20 A. I think it was marijuana but he was on the Naval  
21 base.

22 Q. Oh, because it was like a federal crime?

23 A. Uh-huh, I think so.

24 Q. I see.

25 A. I know one of the charges was he had stolen some

1 They should be going to some sort of special hospital or rehab  
2 instead of going to prison."

3 A. I think it should be more of a combination of both  
4 because part of it could be medically, but, you know, the law  
5 has to step in somewhere.

6 Q. How do you feel about people who use drugs or alcohol  
7 as an excuse to crime?

8 A. It's a cop out.

9 Q. Explain.

10 A. They -- in my experience, people I've known who have  
11 used that excuse use it just to try to get out of getting in  
12 trouble for something they've done.

13 Q. So you don't --

14 A. It's not always the case but sometimes they'll use it  
15 as an excuse.

16 Q. Do you think everybody can be rehabilitated?

17 A. I think everyone deserves a chance to try to be  
18 rehabilitated. I don't think everyone is -- can be but  
19 everyone deserves a chance to try.

20 Q. On your questionnaire when the judge asked you on a  
21 scale of 1 to 10 how strongly you believe in the death penalty  
22 with 1 being the least and 10 being the most you put, "I cannot  
23 say I believe or do not believe without knowing what the facts  
24 are." And I think the judge wasn't trying to tell you how  
25 you're gonna vote in this case, but in general, how you feel

1 jewelry from my sister and she pressed charges.

2 Q. Sorry to hear that. How -- you think -- how do you  
3 think drugs affect crimes in the United States?

4 A. I believe that drugs -- people get addicted to drugs  
5 to a point where they commit crimes so they can get more drugs.

6 Q. And you think that's a medical problem or a legal  
7 problem? In other words, you know, there's some people that  
8 say, he's an alcoholic, you know, he got a felony DWI and he  
9 really can't control himself because he's an alcoholic. But,  
10 of course, our laws say, "You can be an alcoholic all you want,  
11 you just can't drive and drink at the same time," and these  
12 people violate the law. So do you think it's a medical problem  
13 that maybe, you know, the doctors and hospitals should be  
14 taking care of? And I'm talking, you know, alcohol or drugs.  
15 Or do you think that's something that the law should be  
16 concerned about, the legal field, like the criminal justice  
17 system?

18 A. Well, the legal system because -- I never really  
19 thought about it.

20 Q. Well, just -- you know what I'm saying is because  
21 some people might look at your brother and say, "It's clear he  
22 has a problem with drugs. He's sick. It's a disease. It's  
23 something like that." Other people may say, "Well, you know,  
24 it's against the law. He's got to go to court for it." And  
25 some people say, "They shouldn't even be in prison for that."

1 about the death penalty.

2 If somebody had come up to you a week before  
3 you called up for jury duty and said, "Hi, Tina, you know,  
4 what do you think about this death penalty? Are you for it or  
5 against it?" And I'm talking about just in general terms, not  
6 like in specific case, like I think you thought this was in  
7 this specific case.

8 A. Well, no. Because either way without knowing what it  
9 is, how can I make a decision if I believe in it or if I don't  
10 believe in it? Each situation is different.

11 Q. I know, but just the general concept of having the  
12 death penalty. Do you understand what I'm saying? See some  
13 people are for -- some people say there should be a death  
14 penalty in Texas. Some people say there shouldn't be a death  
15 penalty in Texas. I'm trying to figure out how you feel about  
16 just the fact that there's a death penalty, not specifically in  
17 what case.

18 A. I think there should be.

19 Q. Why?

20 A. Because depending on the situation and the case, I  
21 just -- I just feel there should. I don't know how to answer  
22 it. I'm sorry. I just think there should be, but I think each  
23 case should be looked at as an individual.

24 Q. And I'm not arguing with that part. I'm just  
25 wondering the concept, how do you feel about it. Because some

1 people say, "We shouldn't even have it. It doesn't work. We  
 2 still have people committing crimes and murdering people. Why  
 3 bother?"

4 A. I'm sorry. I believe there should be one, yes. But  
 5 I -- specifically reasons that why I think, I wouldn't know how  
 6 to answer that. I just think that it should be there. It  
 7 should be in place for when it's needed.

8 Q. Do you believe that people should -- you would think  
 9 that they should get life more than they should get the death  
 10 penalty? I mean, would you be leaning one way or the other? I  
 11 mean, would you be thinking, it should be life most of the time  
 12 or would you be leaning toward life as opposed to the death  
 13 penalty?

14 A. I don't think I would -- without knowing, I can't say  
 15 I'm gonna vote more for this than that because I don't know.

16 Q. What about -- sometimes people say, "Well, you know,  
 17 before I make a decision I want to hear what he has to say, the  
 18 defendant." How do you feel about that if he doesn't testify?  
 19 Would you expect him to testify?

20 A. No.

21 Q. Or want him to testify?

22 A. I mean, it would be easier if he would but I don't  
 23 see -- because I understand we have to do it based on what  
 24 we're given and I understand each of as individuals have a  
 25 right to not say anything.

242

244

1 Q. But sometimes people say, "Look, Judge, I just can't  
 2 make a decision. I've got to hear their side of the story.  
 3 I've got to hear his side of the story or they've got to put on  
 4 evidence and hear their side of the story before I can make a  
 5 decision." Are you that type of person?

6 A. I don't believe I am.

7 MR. SKURKA: Thank you, Judge. That's all the  
 8 questions I have.

9 THE COURT: All right.

10 VOIR DIRE EXAMINATION

11 BY MR. GARZA:

12 Q. Ms. Torrez, is there any reason why you couldn't be  
 13 fair and impartial to both sides in this case?

14 A. I don't believe so.

15 Q. Would you listen to all the evidence before you make  
 16 any decisions as to guilt or innocence or any decisions as to  
 17 those two special issues?

18 A. Yes, I believe so.

19 MR. GARZA: Thank you, ma'am. I'll pass her.

20 THE COURT: All right. Why don't you wait in  
 21 the jury room and I'll talk to the lawyers.

22 (Venireperson exits courtroom.)

23 THE COURT: Mr. Skurka, what say you?

24 MR. SKURKA: We'll exercise a peremptory  
 25 strike, Judge.

1 THE COURT: That's No. 4, I believe. All  
 2 right. Let's go ahead and bring her in, Frank.

3 (Venireperson enters courtroom.)

4 THE COURT: All right. Ms. Torrez, you were  
 5 not selected to be on this jury but we really appreciate you  
 6 coming down here and speaking with us. And I'm sorry we  
 7 didn't get to you at the time we allotted to get to you, but  
 8 it's a serious case and we're, you know, giving it the right  
 9 attention, okay?

10 VENIREPERSON NO. 79: Okay. Thank you.  
 11 THE COURT: Thank you very much.

12 (Venireperson exits courtroom.)

13 THE COURT: All right. I guess do you want to  
 14 go down the line or do you think this 81 may evaporate, maybe?  
 15 MR. SKURKA: I think she's worse than that  
 16 one, but whatever you want to do, Judge.

17 THE COURT: Well, what I definitely want to do  
 18 -- we're doing okay, I guess. Let's try seeing Clara  
 19 Muguerza.

20 (Venireperson enters courtroom.)

21 VENIREPERSON NO. 81,

22 CLARA MUGUERZA,

23 VOIR DIRE EXAMINATION

24 BY THE COURT:

25 Q. You are Clara Muguerza?

1 A. Yes, sir.

2 MR. JONES: Is that a G or a Y?

3 VENIREPERSON NO. 81: It's a G.

4 Q. (BY THE COURT) You --

5 A. I sit right here?

6 Q. Yes, you sit right there. Obviously, you know we're  
 7 trying to pick a capital murder jury and we're running a little  
 8 behind. It's a very serious case. Sometimes things get a  
 9 little off schedule and we're sorry about that.

10 We want -- we want to talk to you about a few  
 11 things. You filled out your questionnaire and we have that.  
 12 This is a capital murder case, okay, and what's that? Well,  
 13 it's a murder, that's the allegation, and the State is alleging  
 14 the defendant committed a murder. And a murder, of course, is  
 15 the intentional taking of the life of another, but it's capital  
 16 murder. And what is that? Well, I like to call it murder  
 17 plus, murder plus something else. And there's a bunch of  
 18 different ways you can group capital murder. There's somewhat  
 19 of a laundry list.

20 But, in this case, the State is alleging that  
 21 the defendant robbed or attempted to rob the victim, and in  
 22 the course of doing so, committed murder, okay? So we've got  
 23 robbery and murder. What's robbery? If I came and I pointed  
 24 a gun to you and I said, "Give me your purse," that would be  
 25 robbery because that would be through force or threats and I

1 would be forcibly taking property from you.

2 A. Correct.

3 Q. And if I came and I -- and I, you know, pulled a gun  
4 out and you gave me your purse, that would be robbery. I would  
5 have completed it. But what if -- what if I came and robbed  
6 you and I thought you had a purse, but instead, you had a  
7 bowling ball. You were going bowling and you had your bowling  
8 ball, and you hit me on top of the head and knocked me out,  
9 okay? Would I be guilty of robbery? No. But I'd be guilty of  
10 attempted robbery. The State can get there in either case.  
11 They can show an attempted robbery or a robbery in the course  
12 of committing a murder. Do you follow me?

13 A. Uh-huh.

14 Q. All right. But the thing about capital murder is  
15 that the death penalty is a possibility. So when we say  
16 "capital" that means death penalty is a possibility, all right?  
17 And I need to talk to you a little bit about that. Some people  
18 cannot sit in the process where there is a death penalty  
19 possibility. Other people would always vote for death penalty  
20 if they found the defendant guilty of capital murder. I can  
21 tell you there's two possibilities, life or death. Life in  
22 prison and the death sentence. They're pretty serious  
23 punishments either way, okay?

24 A. Uh-huh.

25 Q. I need to know if you have any -- I mean, if this is

1 A. Yes, I do.

2 Q. There are places in the world where that is not the  
3 case and I think those places would be bad places to live just  
4 -- just on that issue, okay? But in our country we don't do it  
5 like that. We say, "State, you've got the burden of proof, you  
6 bring the charges, you prove them, and until you do, the  
7 defendant you've charged is innocent until proven guilty." If  
8 they can prove it the case, okay? You agree with that?

9 A. Yes.

10 Q. And you could presume that the defendant is innocent  
11 until proven guilty?

12 A. Yes, sir.

13 Q. All right. We lawyers have a little question that we  
14 ask sometimes and we say, "If you had to vote right now, how  
15 would you vote?" And some jurors they say, "Well, I can't vote  
16 because I haven't heard anything." And other jurors -- the  
17 right answer actually is not guilty because you haven't  
18 presented anything.

19 A. That's right.

20 Q. That's really not a real world deal. The real world  
21 deal is State presents their evidence. But if they do not  
22 prove it to you beyond a reasonable doubt -- and we'll talk  
23 about it -- that's the standard -- what would be your vote?

24 A. If they couldn't prove to me, not guilty.

25 Q. All right. Beyond a reasonable doubt is the standard

1 something that you can do. If you can't sit through this  
2 process, if you can't participate, that's okay, we'll find  
3 somebody else. If you can, that's okay too. But I do need to  
4 know because it is important.

5 A. Well, I would be able to.

6 Q. Okay. Can you keep an open mind?

7 A. Oh, yes.

8 Q. Okay. Because some people say, "You know what, I saw  
9 something in the media or about this," or they'll say, "You  
10 know, the State charged him, therefore, he's guilty in my mind  
11 so I can't keep an open mind." Okay. That's really not fair.

12 A. That's fine.

13 Q. But if that's you, that's okay, we just need to know.  
14 If you can keep an open mind, that's fine. But if you can't,  
15 that's also fine. Can you keep an open mind?

16 A. Yes.

17 Q. Let's talk a little bit about the law. I've already  
18 talked to you a little bit about it. We're gonna talk some  
19 more. This is a criminal case. Let's see here. You have  
20 never been on a jury before. No experience necessary. We have  
21 plenty of jurors that are first timers, okay? That's not a  
22 problem. But in every criminal case the law says, "The State  
23 brings the charges, the State's got to prove it." Okay?

24 A. Uh-huh.

25 Q. And you agree with that?

1 of proof in this case. We do not have a definition, but I like  
2 to define it by telling the jury what it is not.

3 In a civil case, car wreck, contract dispute  
4 between companies where one sues another -- the suing party we  
5 call them the plaintiff -- they have a burden of proof just  
6 like the State in this case. But that's preponderance of the  
7 evidence, just tipping the scales of justice ever so slightly,  
8 51 percent maybe. In a case in which the State seeks to remove  
9 children because they think that a parent is a bad parent and  
10 neglectful, their burden of proof is clear and convincing. It  
11 sounds like pretty strong stuff, right, clear and convincing?  
12 This burden is higher. Beyond a reasonable doubt is higher  
13 than clear and convincing, okay? It's a high standard that we  
14 have in all of the law.

15 What it is not, however, it is not beyond all  
16 doubt. It is not beyond a shadow of a doubt. The most  
17 important word in beyond a reasonable doubt is reasonable,  
18 beyond a reasonable doubt. Could you hold the State to that  
19 burden?

20 A. To --

21 Q. Beyond a reasonable doubt. The law says it's their  
22 burden to prove this case beyond a reasonable doubt to you, the  
23 jury.

24 A. Well, it all depends. I mean, if the -- if

25 everything's there, then, you know, he would be found guilty or

1 not guilty, I mean.

2 Q. Well, right. But that's the standard of proof. See,  
3 I got to make sure that you're gonna -- that you're gonna hold  
4 the State to beyond a reasonable doubt, okay? Could you do  
5 that?

6 A. Yes.

7 Q. I mean, that is the burden that the law requires and  
8 it's the highest burden that we have in all of the laws. But  
9 it's hard because we don't have a definition. So, to  
10 illustrate to the jurors what that is, I tell them what it's  
11 not. It's higher than the 51 percent, it's higher than clear  
12 and convincing. It is not beyond all doubt. It's in between.

13 Are you following me?

14 A. Uh-huh.

15 Q. One of the examples that's been used is have you ever  
16 been on a plane before?

17 A. One time.

18 Q. But when you got on that plane, did you think that  
19 you were gonna get to your destination?

20 A. Yes.

21 Q. You did, right?

22 A. Uh-huh.

23 Q. Okay. And that's based upon what, maybe it was a  
24 reputable airline? Maybe you've seen service records or you've  
25 heard that, you know, planes are much safer than cars, right?

250

1 And so you evaluated the situation and you got on that plane  
2 because you felt like beyond a reasonable doubt you were gonna  
3 get to your destination. Did you know beyond all doubt that  
4 that plane wasn't gonna crash?

5 A. No.

6 Q. No. Right. But you were satisfied?

7 A. Yes.

8 Q. That's kind of what it's like, okay? And you can  
9 hold the State to that burden?

10 A. Uh-huh.

11 Q. Yes?

12 A. (Nodding head up and down.)

13 Q. Okay. Now, as part of all of this, the defendant  
14 doesn't have to testify, okay? The Constitution says he  
15 doesn't have to testify. And it really makes sense because if  
16 the State's got the burden of proof, they don't really have to  
17 do anything, right?

18 A. Right.

19 Q. Now, maybe -- maybe his lawyers -- there may be a lot  
20 of reasons why he doesn't. Maybe his lawyers say, "Hey, look,  
21 don't testify because they haven't proven their case." I had a  
22 friend who used to laugh inappropriately when he got nervous  
23 and people took it the wrong way. Some people are not good  
24 speakers in front of people. They get nervous. I don't. I  
25 can get in front of a bunch of people, it's not a problem, it's

1 because I've had a lot of practice. But not everybody has  
2 that.

3 So my point in all this is that there's lots  
4 of reasons why somebody may not want to testify. But the law  
5 says, not only does he not have to testify. The jury can't  
6 hold it against him. In other words, if the jury -- if you're  
7 selected on a jury and you go back for deliberations to  
8 determine whether they've proven their case, the State, you  
9 can't say, "Well, you know what" -- and I don't know if you're  
10 gonna testify or not, but if he chooses not to, you can't say,  
11 "You know what, he didn't testify and I have to hear both  
12 sides of it. That's one for the State." You can't do that.

13 A. That's right.

14 Q. Okay. Can you -- can you follow that law, not to  
15 hold it against the defendant?

16 A. Yes, sir.

17 Q. Okay. Now, let's talk a little bit. It's capital  
18 murder and we've already talked about that. We've talked about  
19 life and death, the possibilities, serious punishments, both of  
20 them. The trial works like this. The first part of the trial  
21 it's called the bifurcated system, but that just means it's got  
22 two parts, okay? The first part, guilt or innocence. Can the  
23 State prove beyond a reasonable doubt that the defendant is  
24 guilty of the offense? If the jury says no, the case is over  
25 with. If the jury says guilty, though, then we go to the

252

1 second part, the punishment. What happened? Does he get life  
2 or death, okay?

3 A. Uh-huh.

4 Q. Because it's not an automatic deal either way. But  
5 you don't say life or death. You don't say, "Hey, you know,  
6 let's vote. Okay. We all vote for life or we all vote for  
7 death." We don't do that. You answer questions, and here's  
8 one of them.

9 "Is there a probability that the defendant would  
10 commit criminal acts of violence that would constitute a  
11 continuing threat to society?" Okay. Basically, what does  
12 that mean? Will the defendant probably be violent with others  
13 in the future, okay? It's the future dangerousness question.  
14 Is he gonna be a future danger. And the jury would answer yes  
15 or no. Then they would go to Special Issue No. 2. "After  
16 taking into consideration all of the evidence, including the  
17 circumstances of the offense" -- that's the first part of the  
18 trial, remember I told you the guilt or innocence phase?

19 A. (Nodding head up and down.)

20 Q. -- "the defendant's character and background." Now,  
21 at this stage of the trial you what you hear a lot more things,  
22 not just about what happened that day, but maybe about what  
23 kind of guy he is, what's his character like. Is he a good guy  
24 or is he a bad guy? Is he a person of high morals or is he  
25 just a scoundrel? We don't know. Does he have a good criminal

1 history, meaning he's never been in trouble before, or is he  
 2 just been in trouble his whole life?

3 Then his background. What's that? How did he  
 4 grow up. Did he come from a loving home, you know, or did his  
 5 father just beat him up all the time? Was he sexually abused?  
 6 I mean, there's all kinds of things. Or did he have a great  
 7 education, a lot of opportunities? That's that. "And the  
 8 personal moral culpability of the defendant." That's a lot of  
 9 words, right? That's a lot -- that's a local of legalese.

10 Let me give an example that we've been giving  
 11 and that is, two burglars, right? Two people found guilty of  
 12 burglary. One breaks into somebody's house because he wants  
 13 to get high with his girlfriend and they're gonna go off and  
 14 party in Las Vegas. Okay. So he breaks into all these houses  
 15 and steals TV and they trash the place, and then he's already  
 16 been to prison three or four times for it and he and his  
 17 girlfriend go to Las Vegas and they blow all these people's  
 18 money, okay? That's one person. The other person has three  
 19 children that are starving, he's lost his job. He goes in a  
 20 back door that's unlocked and all he takes is food and he  
 21 doesn't even eat himself. He takes it to feed the kids. The  
 22 same crime, right, but is their personal moral culpability the  
 23 same? In other words, should -- you know what I'm saying?

24 A. Uh-huh.

25 Q. One of them is -- one of them is a lot worse than the

1 ask the jurors to take an oath. "Do you solemnly swear that  
 2 you will render a true verdict based upon the law and the  
 3 evidence presented to you?" And they say yes. I need to know  
 4 from you, can you do that in this case? And do that to -- on  
 5 the guilt or innocence phase and on these questions? Can you  
 6 truthfully answer these questions?

7 A. Yes.

8 THE COURT: Okay. All right. Mr. Skurka.

9 MR. SKURKA: Thank you, Judge.

10 VOIR DIRE EXAMINATION

11 BY MR. SKURKA:

12 Q. Good afternoon, ma'am. How are you doing?

13 A. Great. Thank you.

14 Q. My name is Mark Skurka and this is Geordie Schimmel.  
 15 We work for the District Attorney, Carlos Valdez, and if you're  
 16 seated on this jury we'll be the ones presenting the evidence  
 17 to you. So I'm gonna tell you right off the bat, there's no  
 18 right or wrong answers to anything you say. We just want to  
 19 know how you feel about some of the issues. I don't want you  
 20 to answer in a certain way that you say, "Well, I better answer  
 21 it this way because that's what the judge probably wants me to  
 22 say, or that's what I think the defense lawyers want me to say  
 23 or the State wants me to say." You just answer how you feel  
 24 and then we can deal with that. Fair enough?

25 A. That's fair.

254

256

1 other?

2 A. Right.

3 Q. But that's what that question's about, okay? "Is  
 4 there sufficient mitigating circumstance or circumstances to  
 5 warrant a sentence of life imprisonment rather than the death  
 6 sentence be imposed?" Okay. What is that, sufficient  
 7 mitigating circumstances? Well, maybe you might hear that he's  
 8 a great guy. Maybe you might hear he was an Eagle Scout.  
 9 Maybe you might hear that he does community service, okay? And  
 10 those may be mitigating circumstances. Maybe you might hear  
 11 his childhood was horrible and his father used to beat him up,  
 12 and that -- does it excuse the crime? No. Because he's  
 13 already either getting life or death, okay? The only issue is  
 14 does it make a difference here, okay? And so what you do is  
 15 you take everything that's given to you in the whole trial --  
 16 this is what this question's about, everything that's given to  
 17 you in the whole trial, and you say, "Are there sufficient  
 18 mitigating circumstances? Is there enough lessening  
 19 circumstances that warrant that we give him life instead of  
 20 death?" And the jury would answer yes or no to that question,  
 21 okay?

22 A. Okay.

23 Q. Do you follow me?

24 A. Yes.

25 Q. I need to know -- at the beginning of every trial I

1 Q. The first issue I want to talk to you about is,  
 2 clearly, the death penalty because that's what this case may  
 3 come down to, whether you can sit on a jury and may ultimately  
 4 have to make that decision between life and death, and I want  
 5 to know how you feel about that.

6 A. Well, my answer would be it all depends on the  
 7 circumstances, you know, and I don't have a problem going  
 8 either way.

9 Q. I understand when you say that because it should  
 10 depend on the circumstances and what we call the evidence.

11 A. Exactly.

12 Q. But how do you feel about being put in that position?  
 13 You know that first day when all those people were called in to  
 14 jury duty and you didn't know what kind of a case it was until  
 15 the judge came down and said, "Folks, this is a criminal case."  
 16 And some people thought, well, that's probably gonna be a DWI,  
 17 or a shoplifting case or something. And then the judge says,  
 18 "This is a capital murder case. If you're on this jury, you  
 19 may have to decide the death penalty or not." What was your  
 20 first reaction when heard it was that kind of case?

21 A. Well, really, I didn't really have any reaction.

22 Basically, the questions that we had to fill out, I filled them  
 23 out truthfully, you know. And like I said, it all depends on  
 24 the evidence and I don't have a problem going either death or  
 25 life --

1 Q. When we talk about -- I'm sorry. I didn't mean to  
 2 interrupt you.

3 A. No, that's okay.

4 Q. When we talk about that, a lot of people tell me,  
 5 "Hey, I believe in the death penalty. It's a good law. We  
 6 should have that." And then I say, "Look at this man over  
 7 here, that's him, look at him, John Henry Ramirez." You may  
 8 have to make a decision on this jury whether he lives or dies.

9 A. I understand.

10 Q. You think you can make that type of decision?

11 A. I think so, yes, sir.

12 Q. Why?

13 A. Because I have an open mind to begin with and I like  
 14 to see all the evidence, and I don't judge anybody for what  
 15 they've done until, you know, everything -- all the  
 16 circumstances, everything's laid -- you know, set on the table,  
 17 and I see everything, and then from there, I would know for the  
 18 --

19 Q. And I appreciate you saying you want to wait for  
 20 everything. I just want to know how you feel about having to  
 21 be put in that position to make that decision. Because let me  
 22 tell you why I say that. You know that first day when people  
 23 -- the judge made that announcement, I saw some of the jurors  
 24 and some of them went, "Oh, my gosh, I can't believe it's this  
 25 kind of case." Some people said, "Well, you know, I better

1 murdered, you know, so forth. And that's probably why I  
 2 answered that way.

3 Q. But it says, "You absolutely think it's never  
 4 justified, that we should never have it."

5 A. Well, I -- well, that, I -- at the time when I was  
 6 filling that out, I honestly, you know, I might not have read  
 7 clearly what was, you know, being said because I was kind of  
 8 like in a hurry. But it -- I do feel that sometimes it's  
 9 necessary, and then, it depends, like I said, you know, how the  
 10 crime is, how it was intentionally, you know, murdered, the  
 11 person, you know. It all comes down to the circumstances.

12 Q. I know. But you understand when I read this it made  
 13 it sound like this person doesn't ever believe the death  
 14 penalty should go?

15 A. Well, that was wrong.

16 Q. Okay. And there was another part in here where it  
 17 says, "I do not believe in the death penalty but I'm not sure  
 18 it is not necessary."

19 A. Uh-huh.

20 Q. And you put you agreed with that statement too?

21 A. Was it a question or --

22 Q. Yeah, it's a statement whether you agree or disagree.  
 23 "I do not believe in the death penalty but I'm not sure it is  
 24 not necessary."

25 A. Okay. Well, like I said --

1 listen." And then some people are thinking -- saying, "Like,  
 2 oh, man, I thought this was going to be something else. I  
 3 don't know if I could do that." And each person is different  
 4 but you have to look in your heart and say, "Can I actually  
 5 participate in this type of case, and not just talk about the  
 6 death penalty but actually enforce it if it's necessary?" Tell  
 7 me your reaction to that.

8 A. Well, if it's necessary, then I would, but, you know,  
 9 it depends. Like I said, you know, I need to see the evidence  
 10 and I don't have a problem going either way, and that's  
 11 basically the honest truth.

12 Q. Why do you think we have the death penalty in Texas?

13 A. I feel that there's death penalty because of the  
 14 crime that was committed, the way the person was murdered.  
 15 And, you know, the way it was done for the reason that it was  
 16 done, that's why.

17 Q. How come in your questionnaire there was a part that  
 18 says whether you agree with this statement or not agree, and it  
 19 says, "The death penalty is absolutely never justified." And  
 20 you put "yes" that you agreed with that?

21 A. That it was never justified?

22 Q. Right.

23 A. You know, I -- I feel that, you know, like I said,  
 24 sometimes it is and sometimes it's not, you know, depending on  
 25 the crime, depending how they were murdered, you know, brutally

1 Q. It makes it sound like you don't believe in the death  
 2 penalty.

3 A. Well, to me, like I said, it can go either way and  
 4 some -- you know, it depends on the circumstances. I must have  
 5 not read it correctly, but, you know, I don't disagree with not  
 6 having the death penalty and I don't agree. It depends on,  
 7 like I said, on the circumstances. I cannot --

8 Q. I know, but you keep trying to make it sound like I'm  
 9 talking about a particular case. I'm just talking about in  
 10 general. You know, I'm not talking about this case.

11 A. I believe -- I believe in the death penalty, and you  
 12 know, basically, I cannot sit here and say that I would or  
 13 wouldn't on this case.

14 Q. I'm not asking you. I'm just asking you in general.  
 15 Do you believe in -- what do you feel about the death penalty?  
 16 Not in a specific case and you don't need to say, based on the  
 17 circumstances. I just want to know how you feel about the  
 18 death penalty in general as a concept we have in our law?

19 A. I agree with it in some points.

20 Q. Explain that.

21 A. Okay. I agree with it -- let me give you an example.  
 22 Say there was children involved and the person went into that  
 23 household and literally killed the entire family for no reason.  
 24 Then, in that case, I would think -- I would strongly feel that  
 25 they should deserve the death penalty.

1 Q. So where children are involved?

2 A. Yes.

3 Q. What about in cases do you – about a case where you  
4 murdered somebody while you're robbing them?

5 A. Okay. Well, in that case, I would need to see the  
6 evidence because maybe at that time that person that did the  
7 murder wasn't thinking straight, and you know, problems  
8 occurred in their life, and you know, they made a mistake. It  
9 doesn't necessarily mean that they should get the death  
10 penalty, you know, it depends. And that's the honest truth.

11 Q. If somebody came to you before you -- did you ever  
12 think about the death penalty before you got called in for jury  
13 duty? Because a lot of people tell us, "I've never even really  
14 had to think about it and I've been kind of confronted with my  
15 feelings." Did you ever give much thought to it before this?

16 A. Well, I didn't know at the time when I came the very  
17 first time that it was either gonna be a death penalty or life  
18 sentence. I didn't know anything about that.

19 Q. I know. But my question is, before you were called  
20 in as a juror, how did you feel about the death penalty before  
21 you had to answer questions like this?

22 A. I didn't feel – honestly, I didn't feel anything  
23 because, I mean, like I tell you before, in some circumstances  
24 I would agree that he deserves the death penalty, and then, in  
25 another case, depending on the situation, then I would feel

1 specific case. The judge, when he asks this question says,  
2 that in a murder committed in the course of committing a  
3 robbery. Do you remember the judge saying, "Murder plus  
4 robbery qualifies as a capital murder case where the death  
5 penalty may be imposed." But you said you didn't agree with  
6 the law on there?

7 A. Did it say either yes or no, or did it –

8 Q. It said yes or no.

9 A. It said yes or no?

10 Q. Uh-huh.

11 A. Okay. Well, maybe I – you know, because at the time  
12 that I was doing the questions, I was kind of like doing it  
13 quickly so maybe I didn't really understand the question at the  
14 time that I was answering and that's why

15 Q. Because this basically says, "The law says you might  
16 be able to get the death penalty if you kill somebody while  
17 robbing them," which is what the law has been explained to you  
18 by the judge. But you said you didn't agree with it. You  
19 think you just misread the question?

20 A. Yeah. Well, there's been a lot of cases that, you  
21 know, that there – there's been murder and they don't get the  
22 death penalty. They get life, you know, and so it -- you know,  
23 like I said, it all depends, and that's basically my honest  
24 truth. It all depends what the circumstances are in order to  
25 weigh the situation either life or death.

1 that doing certain life would be sufficient.

2 Q. What kind of things would it take you to make up your  
3 mind?

4 A. Depending how the person was murdered, depending how,  
5 you know, the victim was defensive, you know, how he was  
6 approached, if he – let me give you an example. If say the  
7 person had a knife and stabbed him like a hundred times, and  
8 you know, cut him up to pieces, you know, that was not called  
9 for, so in that situation, I would do the death penalty.

10 Q. So if it was multiple wounds, you'd kind of be  
11 leaning toward the death penalty?

12 A. Probably.

13 Q. You said here – in your questionnaire it says, "The  
14 law in Texas says that an intentional murder committed in the  
15 course of committing or attempting to commit a robbery  
16 qualifies as a capital murder in which the death penalty may be  
17 imposed. Do you agree with this law?" And you put no. Can  
18 you explain that, why you said that?

19 A. Well, again, you know, I have an open mind. It all  
20 depends on the circumstances. I cannot sit here and say,  
21 "Well, you know what, I'm gonna give this person the death  
22 penalty because of the crime that he did." Because I've never  
23 heard of this story to begin with so I couldn't, you know,  
24 really answer.

25 Q. I know, but the judge is not talking about this

1 Q. But the point is to even qualify to be eligible for  
2 the life or death sentence, which is capital murder, you have  
3 to qualify under the law, and the law says, if you do it,  
4 murder somebody while you're robbing them, that qualifies it.  
5 You're saying you don't believe in that law or not?

6 A. It's not that I don't believe. I believe, you know,  
7 in the law, I just don't – I can't just -- you know, it  
8 basically doesn't really give you the option to, you know,  
9 write what you feel or anything. It just says yes or no.

10 Q. Well, it says "please explain." You can write  
11 something in there.

12 A. I don't remember. It does say explain?

13 Q. Do you want to see yours?

14 A. No, I believe you. And basically, that's my answer.  
15 But I do believe that it is -- it qualifies for death penalty  
16 but -- and depending on the circumstances, and that's basically  
17 what I feel.

18 Q. But you understand it only depends on what the crime  
19 is called. Like take, for example, a person can kill somebody,  
20 chop their body up in a hundred different places and mail them  
21 out to a hundred different places. You know what, that sounds  
22 funny, but that's not a capital murder case. You couldn't get  
23 the death penalty for that because it's just plain murder. See  
24 what I'm saying? There's only certain type of cases that make  
25 you eligible for probation. I mean -- not eligible probation,

1 eligible for the death penalty, excuse me.

2 A. For the death penalty. So that wouldn't be committed  
3 -- I mean, that wouldn't be --

4 Q. That wouldn't even make a death penalty. That sounds  
5 funny, right?

6 A. The way the law is?

7 Q. Yeah.

8 A. In some ways.

9 Q. Well, that's what I'm trying to figure out because it  
10 sounds to me like maybe I would have to prove that, you know,  
11 the guy stabbed somebody a hundred times before you could give  
12 the death penalty, and you know, the law doesn't require that.  
13 They could be shot one time, stabbed one time, you know.

14 A. Well, they have strange laws.

15 Q. Say again?

16 A. They have strange, you know, ways and laws, you know,  
17 like for the example that you're giving me.

18 Q. And I understand. That's why we're talking about it  
19 now because I just want to know if you're the kind of person  
20 that needs that extra stuff. Because what if I have the case  
21 -- what if I have any case and he just stabbed the guy one time  
22 and not, you know, a hundred times, or shot the guy one time.  
23 It sounds to me like you're gonna say, well, I couldn't give  
24 the death penalty for that kind of case because I could only do  
25 it if it was like, you know, like you said, your words, a

1 death penalty if you show me, Mr. Skurka, that he's been  
2 convicted of a lot of other crimes." Is that what you're gonna  
3 require me to do? And if you are, that's fine. I just need to  
4 know.

5 A. No, that's not what -- that's not why I'm saying what  
6 I'm saying. It's just I need to see the circumstance to see,  
7 you know. I cannot say death or life, which one I'm gonna --  
8 you know, go and do because I need to see the circumstances.

9 Q. I know, ma'am.

10 THE COURT: Okay. Look, look. We've gone  
11 around and around.

12 MR. GARZA: Your Honor, I'm gonna object to  
13 the --

14 THE COURT: Look, here's the deal. Here's the  
15 deal, okay?

16 MR. JONES: She already answered the question.  
17 THE COURT: I agree.

18 MR. GARZA: It's asked and answered, Judge.

19 THE COURT: I agree, but I'm gonna go over it  
20 again. Here's the deal, okay? Capital murder means murder,  
21 in this case, plus robbery, okay? You have to consider -- if  
22 you get to the guilty, you have to consider this question,  
23 that is, only if you think he's a continuing threat to  
24 society. Then you get to the second question. Circumstances  
25 of the offense. That in and of itself can be enough to

266 268  
1 hundred times, stabbed him 100 times. Would it be more  
2 difficult for you to do it that way?

3 A. Well, like I said, it all depends, you know. Like  
4 say if it was one stab wound, right? But he got the knife and  
5 he was doing this, you know, (indicating). It just depends  
6 what it is. I mean, I cannot sit here and tell you that, you  
7 know, I'm gonna say the death penalty because of what he did or  
8 say life, you know. I need to hear the circumstances.

9 Q. And I'm not gonna -- I can't tell you what the  
10 circumstances of this case are and I can't commit you to say  
11 what you're gonna vote for. That's why I'm talking about  
12 generics. Because in your next question it says, "The law in  
13 Texas says the person convicted of capital murder may receive  
14 the death penalty solely because of the facts and circumstances  
15 of the crime, even if the person has committed no other  
16 previous crimes. Do you agree with this law?" And you put no.

17 A. In that case, you know, say -- right there is saying  
18 he's never committed another crime but just that one, you know,  
19 and people make mistakes, you know. And I, in that part, may  
20 not give him the death penalty because he's never done crimes  
21 before. It's only happened at that time, and so, that's why I  
22 answered that question.

23 Q. And it's okay for you to feel that way. I'm not  
24 picking on you or trying to argue with you about that. Because  
25 some people may say that. They say, "Look, I can only give the

1 warrant a death sentence, okay, in and of itself?

2 VENIREPERSON NO. 81: Right.

3 THE COURT: But you've got to consider  
4 everything, all right?

5 VENIREPERSON NO. 81: That's right.

6 THE COURT: You consider his history, you  
7 consider what kind of guy he is, you consider his background.  
8 And remember that personal, moral culpability? Agreeing with  
9 or disagreeing with the law is not the standard. The standard  
10 is, can you follow it?

11 VENIREPERSON NO. 81: That's right.

12 THE COURT: Can you follow the laws that we've  
13 talked about; that is, can you sit here and determine, based  
14 upon the evidence presented to you beyond a reasonable doubt  
15 whether this defendant's guilty of capital murder?

16 VENIREPERSON NO. 81: Yes.

17 THE COURT: Can you truthfully answer these  
18 questions and render a verdict based upon the law and evidence  
19 presented to you on these two questions?

20 VENIREPERSON NO. 81: Yes.

21 THE COURT: Okay. I mean -- Okay.

22 Q. (BY MR. SKURKA) Okay. My question is this, ma'am.

23 A. Yes.

24 Q. What if the person doesn't have any priors?

25 THE COURT: But you're asking --

1 MR. GARZA: Once again, Your Honor, I'm gonna  
 2 object to the form of the question. It's calling for a  
 3 commitment.

4 THE COURT: You are asking for a commitment  
 5 and I've sustained some objections that you've made the other  
 6 way.

7 MR. SKURKA: Let me rephrase it then, Judge.

8 THE COURT: Okay.

9 Q. (BY MR. SKURKA) The question asked from the  
 10 questionnaire says, "That a person convicted of capital murder  
 11 may receive the death penalty solely because of the facts and  
 12 circumstance of the crime," what he did that day.

13 A. Right.

14 Q. Even if the person has committed no other previous  
 15 crimes, and for lack of a better word, I call them first time  
 16 offenders.

17 A. Okay.

18 Q. Okay. The law says that person can get the death  
 19 penalty. But you told me a few minutes ago -- I thought you  
 20 told me a few minutes ago -- and you change it if I'm incorrect  
 21 -- that you said, "Well, I couldn't do" -- I thought you said,  
 22 "I may not be able to do the death penalty if this is only his  
 23 first time he's committed a crime."

24 A. No.

25 Q. Is that what you said or not?

1 something that you would consider that he has prior  
 2 convictions? I'm not saying that you have to say, Okay, he's  
 3 got prior convictions so I am going to, you know, give him the  
 4 death penalty. I'm not saying that. It is something that you  
 5 would consider as part of this overall picture?

6 VENIREPERSON NO. 81: I would consider it,  
 7 like you said, in all, to see how his life was, if he was a  
 8 problem in society, if he was always in trouble, robbing  
 9 (sic) or if he's had other killings, you know. It all depends  
 10 at the time of the hearing what I hear. And basically, I  
 11 would be able to make a decision at that time, you know, and I  
 12 wouldn't have a problem. But I understand what you're trying  
 13 to tell me. I would put everything together and view it.  
 14 Before -- you know, I can't sit here and say, you know what,  
 15 you did it, you're guilty.

16 THE COURT: Well, no, you haven't heard any  
 17 evidence.

18 VENIREPERSON NO. 81: Of course not.

19 THE COURT: But really, what we're talking  
 20 about is more of a punishment issue right now. Assuming you  
 21 find the defendant guilty -- and that's a big assumption  
 22 because they have to prove it, okay? It's a big assumption.

23 VENIREPERSON NO. 81: Yes.

24 THE COURT: And you know we had a juror  
 25 earlier in the week that said, "Well, I guess you already

270 272

1 A. No. What I'm trying to tell you is I need to see the  
 2 evidence in order -- I mean, I cannot give you a straight out  
 3 answer. I mean, I've never seen him before, I don't know what  
 4 the crime's really about because I've never heard of it, and I  
 5 can't sit here and tell you, you know, yes, you know what, I'm  
 6 gonna give him the death penalty.

7 Q. I'm not asking you that, ma'am.

8 A. I understand that.

9 Q. What I'm trying to say is, is it gonna weigh on you?  
 10 Are you gonna be leaning toward a life sentence instead of a  
 11 death sentence because he doesn't have any priors?

12 MR. GARZA: Once again, Your Honor --

13 THE COURT: Sustained.

14 MR. GARZA: -- he's asking for a commitment,  
 15 Judge.

16 THE COURT: Sustained. You don't have to  
 17 answer that question.

18 Q. (BY MR. SKURKA) How important to you is it that a  
 19 person has prior offenses in making that decision on giving the  
 20 death or life sentence?

21 MR. GARZA: Once again, Your Honor, same  
 22 objection.

23 MR. SKURKA: That is not a commitment  
 24 question, Judge. I asked her --

25 THE COURT: Look, here's the thing. Is it

1 think it's gonna be guilty." No, this is -- we only get to  
 2 talk to you once, okay? We don't get to do the guilt or  
 3 innocence first and then go to the second part and then say,  
 4 "Okay, now let's talk to the jurors again." We only get to  
 5 talk to you. That's why we're bringing this up now. But the  
 6 question is this: Could you consider, you know, a criminal  
 7 history? I'm not saying that if his criminal history's bad  
 8 that means that you still have to give him the death penalty.  
 9 But I will say that it's something that you should consider,  
 10 weigh, okay? And all -- all of his background that's  
 11 presented to you, everything should be weighed in light of  
 12 that question, and this one as well, okay?

13 VENIREPERSON NO. 81: I agree with that.

14 THE COURT: Can you do that?

15 VENIREPERSON NO. 81: Yes.

16 THE COURT: Now, the law says, the  
 17 circumstances of the offense can be enough, okay, to answer  
 18 these questions. In other words, if you think that the  
 19 offense is so bad, then that, in and of itself, can aide you  
 20 in answering these questions. But we're not gonna tell you  
 21 the facts. That's improper at this point, okay? But could  
 22 you consider merely the circumstances of the offense in  
 23 answering that question, yes?

24 VENIREPERSON NO. 81: Yes.

25 THE COURT: Yes?

1 VENIREPERSON NO. 81: Yes.

2 MR. SKURKA: I don't have any other questions,  
3 Judge.

4 THE COURT: Okay. Defense.

5 VOIR DIRE EXAMINATION

6 BY MR. GARZA:

7 Q. Ms. Muguerza, I believe you're trying your duty bound  
8 best to understand these concepts, and I think you do  
9 understand these concepts. Do you understand that the first  
10 part of the trial you're gonna have to listen to the evidence  
11 to see if the State can prove the case beyond a reasonable  
12 doubt before you make a decision as to my client's guilt or  
13 innocence? Because right now he's innocent until they prove  
14 him guilty.

15 A. That's correct.

16 Q. Do you understand that?

17 A. Yes.

18 Q. That's called the presumption of innocence, okay?

19 A. Uh-huh.

20 Q. And they have to prove the case, they have the  
21 burden, and they have to do it beyond a reasonable doubt. Do  
22 you do you understand that concept also?

23 A. Yes, sir.

24 Q. Okay. Now, we have to talk about all this stuff like  
25 oh, what if, and what if, and what if, and you know, what will

1 A. Yes, I am a very fair person here, out there. I'm --  
2 that's the way I am.

3 MR. GARZA: Thank you, ma'am. That's all the  
4 questions I have.

5 THE COURT: Anything else?

6 MR. SKURKA: No, Your Honor.

7 THE COURT: All right. Why don't you wait in  
8 the jury room and we'll get right back with you.

9 VENIREPERSON NO. 81: Okay. Can I get out  
10 through here?

11 THE COURT: Yeah, go right through there.

12 (Venireperson exits courtroom.)

13 MR. SKURKA: Judge, we'll exercise a  
14 peremptory strike.

15 THE COURT: All right. Let's bring her back  
16 in.

17 (Venireperson enters courtroom.)

18 THE COURT: All right. Mrs. Muguerza, you  
19 were not selected to be on this jury but we do appreciate your  
20 time. If you need a work excuse we can help you with that,  
21 okay? All right. So I guess -- do you want to take a little  
22 break. Let's take a little break.

23 MR. GARZA: Can we have a little break?

24 Mr. Skurka tired me out.

25 (Recess.)

274  
1 happen if you do find him guilty and all these special issues  
2 because this is the only time we get a chance to talk to you  
3 about everything, okay?

4 A. Yes, sir.

5 Q. Not because we've already made our minds up or  
6 because, you know, we've made some sort of a determination. It  
7 doesn't matter what we think, okay? It doesn't matter at all  
8 what the lawyers think at all, okay? What matters is that you,  
9 as a juror, as a person, you know, can sit in this case and be  
10 fair and impartial to both sides. Do you know what I mean by  
11 impartial?

12 A. Yes.

13 Q. What does that mean?

14 A. To weigh out the situation and to be open-minded for  
15 both, you know, his evidence and yours.

16 Q. In other words, you come to the table to assume your  
17 position as a juror without any opinions already or any  
18 presuppositions about anything?

19 A. Exactly.

20 Q. And is that you?

21 A. Yes.

22 Q. Is that the same in so far as these punishment  
23 issues, if we get there?

24 A. Yes.

25 Q. Can you be fair about that too?

276  
1 THE COURT: All right. Let's bring him in.

2 Ryan Hill.

3 THE BAILIFF: Judge, just to let you know, we  
4 had four in there.

5 THE COURT: All right. Mr. Hill, come  
6 forward.

7

8 VENIREPERSON NO. 80,

9 RYAN RICHARD HILL,

10 VOIR DIRE EXAMINATION

11 BY THE COURT:

12 Q. I'm sorry, Mr. Hill. We are working real hard in  
13 here.

14 A. All right.

15 Q. I got to tell you. I know you've been waiting. We  
16 are not messing around. We are working real hard. This is  
17 obviously a very serious case so we're trying to do it right,  
18 okay?

19 A. Okay.

20 Q. But we are sorry for the delay.

21 Okay. We're looking for two things here for  
22 our jurors. We want people that can keep an open mind, okay,  
23 because if they can't keep an open mind, it's not fair, right?

24 A. Right.

25 Q. And you wouldn't want a friend or family member or

1 yourself to be on trial if there were people that couldn't keep  
 2 an open mind about your case, right?

3 A. Yes, sir.

4 Q. Okay. So is that you, can you keep an open mind?

5 A. Yes, sir.

6 Q. Okay. You have heard some stuff about it in the  
 7 media, but I want to caution you what the media reports isn't  
 8 always right?

9 A. Yeah.

10 Q. And I'm gonna need you, if you're gonna be selected  
 11 on this jury to promise me that you're only gonna base your  
 12 decision based upon what comes into court in the courtroom, in  
 13 this courtroom, the evidence that's presented to you. Can you  
 14 do that?

15 A. Yes, sir.

16 Q. Okay. Now, then, let's go on to the next thing. We  
 17 need to talk about the law. I need to make sure you can follow  
 18 the law. You have never been on a jury before. That is not a  
 19 problem, but we need to talk to you about it. This is a  
 20 criminal case, okay?

21 A. Uh-huh.

22 Q. That means the State's got the burden of proof. The  
 23 law says, "State, you bring the charges, you've got to prove  
 24 them." Okay? Fair enough?

25 A. Uh-huh.

1 it's because somebody's liberty is at stake here, all right?

2 Now, it is not beyond all doubt, because if it  
 3 was beyond all doubt you'd have to have been there, and if you  
 4 were there, they'd be calling you as a witness and you couldn't  
 5 be a juror, okay?

6 A. Okay.

7 Q. Do you follow what that is?

8 A. Yes, sir.

9 Q. Okay. Would you hold the State to that burden beyond  
 10 a reasonable doubt?

11 A. All right.

12 Q. Yes?

13 A. (Nodding head up and down.)

14 Q. Yes?

15 A. Uh-huh.

16 Q. You have to speak up because she's taking it down.

17 A. Yes.

18 Q. Okay. Now, the law says, "Defendant is innocent  
 19 until proven guilty." I mean, that's right. He's innocent,  
 20 okay, till the State can prove otherwise, if they can. Maybe  
 21 they can't, okay?

22 A. Okay.

23 Q. It's what the law says. It's an ancient concept. It  
 24 comes from the Greeks. Innocent until proven guilty. And you  
 25 have to presume that he's innocent. Some places in the world

278

280

1 Q. You agree with that law?

2 A. Yeah.

3 Q. All right. Burden of proof is beyond a reasonable  
 4 doubt. You may remember that from school, maybe you -- maybe  
 5 you read, watch the History Channel, something like that,  
 6 *American Justice*, stuff like that. There's no definition of  
 7 what it is, but let's talk about what it is not so that you can  
 8 get an understanding of what it is, okay?

9 A. Okay.

10 Q. It is not preponderance of the evidence.

11 Preponderance of the evidence is the burden in a civil case,  
 12 okay? This was a contract case, maybe, between two businesses  
 13 fighting over a contract. One side sues the other. The side  
 14 that sues the other, the plaintiff, the one that brings the  
 15 case has the burden of proof, but it's just -- just tipping the  
 16 scales of justice ever so slightly, 51 percent, if you will?

17 A. Uh-huh.

18 Q. If the State seeks to take away kids from -- from a  
 19 person because they feel like they're unfit, the burden's  
 20 higher. It's called clear and convincing. I know that sounds  
 21 pretty clear, right, clear and convincing?

22 A. Uh-huh.

23 Q. This is higher than that. This is beyond a  
 24 reasonable doubt, okay? Are you following me? It's the  
 25 highest burden that we have in all of the law. And, of course,

1 if the State says you did it, you're guilty until you can prove  
 2 otherwise. We don't do it like that. Okay. We -- we make the  
 3 State prove the charges here. So could you presume the  
 4 defendant innocent until the State could prove otherwise?

5 A. Yes, sir.

6 Q. If they can at all. We don't know.

7 A. Yes, sir.

8 Q. Okay. Now, as part of this, the defense has no  
 9 burden. State's always got the burden and so, because of that,  
 10 the law says defendant doesn't have to put on any evidence,  
 11 doesn't have to testify. And there's a lot of reasons why he  
 12 may not. Maybe his lawyers tell him not to. Maybe they say,  
 13 "Hey, you don't need to testify. They haven't proven their  
 14 case."

15 A. Okay.

16 Q. Or maybe -- maybe he's not a good speaker, you know,  
 17 maybe he's not somebody that does well in front of people.

18 Some people get really stressed in front of people.

19 A. Yes.

20 Q. I do this for a living so I don't have a problem with  
 21 it, but you know, some people that aren't used to it they get  
 22 very stressed out. Maybe his lawyers tell him not to, okay?  
 23 It doesn't really matter why. My point is, you can't hold it  
 24 against him. In other words, the law says, "Not only can they  
 25 not call him as a witness, not only can they not make him get

1 up here, if you're selected on a jury you can't hold it against  
 2 him." Some people say, "Well, I've got to hear both sides of  
 3 the story." But this isn't a race, okay? This isn't a race  
 4 between the State and the defendant. The only issue is whether  
 5 the State can get across the finish line which is reasonable  
 6 doubt, all right?

7 A. Okay.

8 Q. So would you -- would you follow that law and not  
 9 hold it against the defendant?

10 A. Yes, sir.

11 Q. Okay. All right. Now, let's talk about the crime  
 12 itself. The allegation is capital murder and what is that?  
 13 Well, murder is within it, so it's obviously murder, right?  
 14 Murder, the intentional taking of the life of another, okay?  
 15 Well, what's the capital part about? Well, I like to call it  
 16 murder plus, murder plus something else, and there's a list of  
 17 things the legislature has designated as things that are  
 18 capital murders. I'm gonna focus on this one, okay? In this  
 19 one, the legislature has said if you've got murder while in the  
 20 course of committing a robbery or attempting to commit a  
 21 robbery, two serious felonies put together, that's capital  
 22 murder, okay?

23 A. Yes, sir.

24 Q. And what's the capital signify? That means that the  
 25 death penalty is a possibility, okay? We got murder plus.

1 A. Uh-huh.

2 Q. Okay. And those are the only two possibilities. But  
 3 a jury doesn't go back and there and say, life, or after we've  
 4 considered everything, death. They don't do it like that. You  
 5 answer questions, okay? Here's the question, the first one.  
 6 "Is there a probability that the defendant would commit  
 7 criminal acts of violence that would constitute a continuing  
 8 threat to society?" What does that mean? Is it probable that  
 9 the defendant would be violent to people in the future? Okay.  
 10 You've got to make that call and say -- answer yes or no, okay?

11 A. Okay.

12 Q. Then you've gone to Special Issue No. 2. "After  
 13 taking into consideration all of the evidence, including the  
 14 circumstances of the offense" -- that's the first part of the  
 15 case, guilt or innocence -- "the defendant's character and  
 16 background," -- all right, what's that? Well, what's  
 17 character? Well, that's like, you know, what kind of guy is  
 18 he? Is he a straight up guy, you know? Is he a good person,  
 19 is he not, you know? Do you follow me?

20 A. Yes.

21 Q. Is he a liar and a cheat, or is he just a straight up  
 22 guy, and other than this day has been a straight up guy all his  
 23 life, okay?

24 A. Yeah.

25 Q. His background, what's his background? Well, what

282

284

1 It's a qualifying murder if they can prove everything that  
 2 they've alleged, all right? So there's a lot of elements  
 3 because you got murder, plus you got a robbery, you've got to  
 4 show that it was this person charged on the given date -- on or  
 5 about the given day in Nueces County, Texas. Would you hold  
 6 the State to proving all of their elements before you found the  
 7 defendant guilty of capital murder?

8 A. Yes, sir.

9 Q. Okay. Now, we have a bifurcated system in Texas and  
 10 all that means is there's two parts. There's guilt or  
 11 innocence, okay? We have a trial and see if the defendant can  
 12 -- can -- if the State can prove that the defendant is guilty  
 13 beyond a reasonable doubt. If they don't, if -- if you think  
 14 you know what, you haven't met your burden. He's innocent  
 15 until proven guilty and you haven't met your burden beyond a  
 16 reasonable doubt, not guilty, okay? And you understand that's  
 17 what you have to do?

18 A. Yes, sir.

19 Q. If, however, the State meets their burden, we go to  
 20 the second phase, punishment. There are two possibilities in a  
 21 capital murder if the person's found guilty, okay? Life in  
 22 prison or death, both very serious penalties. You'd agree with  
 23 me on this?

24 A. Yes.

25 Q. Either one's pretty serious?

1 was his childhood like? Did he have a good childhood? Was it  
 2 terrible? Maybe somewhere in between, all right? You may hear  
 3 these other things in the second part of the trial. Okay.  
 4 You've got to consider that. -- "and the personal moral  
 5 culpability of the defendant." That's a hard thing to  
 6 understand when you read it, right? The personal moral  
 7 culpability of the defendant.

8 Let me give you an example of what we've been  
 9 using, okay? Two guys get convicted of burglary. One of  
 10 them, all he wants to do is he likes -- he likes to use  
 11 cocaine and party with his girlfriend so he breaks into a  
 12 house and tears the place up and he steals TVs and, you know,  
 13 little kid's video game machine, and just trashes the house,  
 14 takes everything of value, you know, the wife's wedding ring  
 15 that was her grandmother's.

16 A. Yeah.

17 Q. And just sells it for dope and they use -- he and his  
 18 girlfriend go to Las Vegas and they use drugs and spend it all.  
 19 He gets arrested. Come to find out he's been to prison twice  
 20 before for a burglary, okay?

21 The second guy goes into somebody's house, but  
 22 he doesn't break in. He just goes in an unlocked door. And  
 23 the reason that he goes in is to steal food for his kids  
 24 because he's lost his job and he just can't feed the kids, and  
 25 he doesn't even eat the food himself. He's hungry too but he

1 doesn't eat -- he just takes the stuff for his kids, all right?

2 A. Okay.

3 Q. Do they have the same personal moral culpability?

4 No, not at all. Their motivations are completely different.

5 Do you agree?

6 A. Yes, sir.

7 Q. And one of them is very self-motivated, very selfish.  
8 And the other is wrong because you can't go into someone else's  
9 house and take food. But, you know, you can understand why  
10 they should be treated differently. Do you agree with that?

11 A. Yes, sir.

12 Q. And the punishment probably should be different. Do  
13 you agree?

14 A. Yes, sir.

15 Q. Okay. That's what that part of the question's about,  
16 all right? Okay. "Is there a sufficient mitigating  
17 circumstance or circumstances to warrant a sentence of life  
18 imprisonment rather than a death penalty being imposed?" Okay.  
19 What is a mitigating circumstance? Well, it's something in the  
20 defendant's favor. It's something that lessens his perhaps --  
21 it's a circumstance that's lessening. Are you following me?

22 A. Yeah.

23 Q. Like maybe he taught little kids to read, you know,  
24 maybe he was an Eagle Scout, maybe he was, you know, real good  
25 to his mother, you know. And these are just examples because

1 Q. And the jury would answer yes or no to this question,  
2 okay?

3 A. Okay.

4 Q. Now, at the beginning of this trial, I have to swear  
5 in the jurors and the oath goes like this. Do you swear that  
6 you will solemnly render a verdict -- a true verdict based upon  
7 what, the law and the evidence as presented to you? They will  
8 tell me yes. What I need to know from you is, can you do that?  
9 And before you answer, some people tell me, "I cannot because I  
10 cannot participate in a process that could lead to the death  
11 penalty." Others will tell me, "If I find someone guilty of  
12 capital murder, I'm not gonna follow this law. I'm gonna  
13 answer the questions in such a way so that he gets the death  
14 penalty." Neither of those people can take this oath. But I  
15 need to know from you if you can take the oath?

16 A. Yes, sir.

17 THE COURT: Okay. Mr. Skurka.

18 MR. SKURKA: Mr. Schimmel's gonna handle this  
19 juror, Judge.

20 MR. SCHIMMEL: Thank you, may I proceed?

21 THE COURT: Yes, sir.

22 VOIR DIRE EXAMINATION

23 BY MR. SCHIMMEL:

24 Q. Mr. Hill, hi. My name is George Schimmel. This is  
25 Mark Skurka.

1 the only people that can determine what a mitigating  
2 circumstance is, is the jury. These lawyers will suggest  
3 during this trial, I believe, if we get to that point, what  
4 mitigating circumstances are, but only you, if you're selected  
5 on this jury get to decide. One juror may think, "Being an  
6 Eagle Scout is a mitigating circumstance." Another one may  
7 say, "That doesn't mean anything to me." Okay? Are you  
8 following me?

9 A. Yes, sir.

10 Q. Then you determine after you take in all these  
11 things, is there sufficient mitigating circumstances, because  
12 you might find -- you know, there are mitigating circumstances.  
13 They are in his favor and I'm considering them. But they are  
14 not sufficient to warrant life rather than death, or you may  
15 think they are sufficient to warrant life instead of death.  
16 Are you following me?

17 A. Yes.

18 Q. Okay. Basically, this question is asking you to take  
19 the whole trial, everything that's presented to you and say,  
20 "All right. Based upon everything that I've heard, the  
21 circumstances of the offense, his character, his background,  
22 and his personal moral culpability, is there anything that I've  
23 heard that warrants a sentence of life rather than death?" Do  
24 you follow that question?

25 A. Yes, sir.

1 A. Hello.

2 Q. I just want to ask you a couple of questions and I  
3 guess the first thing I'd like to tell you is that there really  
4 isn't any right or wrong answers to the questions we're asking.  
5 I just want to pretty much get the answers to what you're  
6 saying -- I mean to what we're asking.

7 The first question I've got for you is when  
8 you came in a couple of weeks ago and -- is this the first  
9 time you were called for jury duty?

10 A. For the summons that day, no.

11 Q. You've been called before as a juror?

12 A. Uh-huh.

13 Q. Probably not as a capital murder jury though, right?

14 A. Right.

15 Q. What was your first thought when you came in and  
16 found out it was a capital murder type case?

17 A. I was pretty much surprised. I didn't think it was  
18 that bad.

19 Q. Okay. You didn't think like, "Oh, my God, this is  
20 just something I can't possibly do this is going to take way  
21 too long of my life."

22 A. The other ones before have just been minor things.  
23 That's what I was kind of expecting.

24 Q. Okay. So not that big of a deal. How would you feel  
25 if you were actually selected to be on this kind of jury and

1 you had to make this kind of decision? How would you feel  
 2 about that?

3 A. A little bit of mixed emotions, I guess. Really, I  
 4 mean, no feelings at all right now, just pretty much mixed  
 5 emotions. I would have to go through and see how I feel, but  
 6 right now, just nothing.

7 Q. Okay. When you say "mixed emotions" do you mean --  
 8 is that a bad thing, or kind of good, kind of bad?

9 A. Kind of good, kind of bad. I mean, I understand, you  
 10 know, what we're going through, you know. But, then again,  
 11 seeing somebody that might die from it, you know, that's a bad  
 12 emotion I have with it.

13 Q. Do you think that emotion is so bad you wouldn't be  
 14 able to do this kind of thing?

15 A. No.

16 Q. Okay. Now, at some point, the State's gonna put on  
 17 evidence and I want to tell you just kind of quickly how these  
 18 trials work. There's a guilt innocence part of the trial where  
 19 the State puts on evidence. The defendant can if they want to,  
 20 they don't have to. And at the end of that, you as juror will  
 21 either decide whether the defendant was guilty or he wasn't  
 22 guilty. If you decide he's not guilty, the trial's over. But  
 23 if you decide he's guilty, then we go to the second part of the  
 24 trial which is totally different than any other kind of trial.

25 A. Uh-huh.

1 course of doing something else, like a robbery or a burglary.  
 2 Do you think -- well, first of all, do you agree with our law?  
 3 I mean, do you think we should have a death penalty law in  
 4 Texas?

5 A. Yeah.

6 Q. How do you feel about it?

7 A. If the crime's bad enough, I think they should.

8 Yeah, they deserve the death penalty.

9 Q. Okay. But you don't have a problem with the law  
 10 itself?

11 A. No.

12 Q. You don't have any problem with the law?

13 A. No, I have no problem with it.

14 Q. Now, what I talked about a little earlier with those  
 15 special issues and about how the trial works and how we start  
 16 out with the guilt and innocence part of the trial and then we  
 17 move on from there to the special issues. Assuming that you do  
 18 find guilt, which you don't have to do. Those special issues  
 19 are right behind you, and I'd like to go over those with you  
 20 just really quickly and kind of clear up some things, or some  
 21 questions you might have.

22 A. Okay.

23 Q. Let's look at that first one over your left shoulder,  
 24 Special Issue No. 1. Read that really quick to yourself and  
 25 then we'll talk about it.

290  
 1 Q. And at that point, the State puts on different kinds  
 2 of evidence and I'll talk to you in a second, but we put on  
 3 evidence about special issues. Now, at some point, if we prove  
 4 it to your satisfaction, the State will be asking you to  
 5 convict this person and be asking for the death penalty. Is  
 6 that something you could do? Now, I mean, I know in theory a  
 7 person says the death penalty is not such a bad thing, you  
 8 know, and I understand that. But this is different because  
 9 we're talking about that guy right there. So I'm just gonna  
 10 ask you to take a look at him and to see -- I mean, is that  
 11 something you could do? Could you live with yourself if you  
 12 did it?

13 A. Yes, sir.

14 Q. Okay. That's not that big of a deal. Let me tell  
 15 you quickly about a little bit more about what the judge said  
 16 about how these cases work. I'm sure you've heard of murder  
 17 cases before. That's just a pretty much straight up thing  
 18 where somebody intentionally takes somebody else's life. In a  
 19 situation where if you had a guy who cut somebody up into  
 20 pieces and hid him in a suitcase for a year, that guy would not  
 21 be eligible to receive the death penalty just for doing that.  
 22 That's nothing but a murder. The death penalty is a little bit  
 23 different. It's when you have a murder and something else,  
 24 either like maybe killing a child under six, killing a cop when  
 25 he was on duty, or murdering somebody while you were in the

292  
 1 A. Okay.  
 2 Q. Okay. That's the Special Issue No. 1 and it's what  
 3 sometimes people call the future dangerousness or future danger  
 4 issue. And really, it's asking a couple of things. It's  
 5 asking if there's a probability that the defendant would commit  
 6 crimes of violence that would constitute a continuing threat to  
 7 society. Okay. I want to talk about three things. The first  
 8 one is that word "probability." It doesn't mean -- the State's  
 9 not telling you that you have to be certain that this person is  
 10 gonna go out into the world and do bad stuff. It's talking  
 11 about whether there's a probability. That's sort of like  
 12 50/50, but a little bit more, like 51/49. And I don't want you  
 13 to think that the State's trying to convince you beyond a doubt  
 14 100 percent certain that this person's gonna go out and do bad  
 15 stuff. That's just not what the standard is, number one.

16 Number two, is that idea about criminal acts.  
 17 Can you give me any -- any ideas or any definitions of what a  
 18 criminal act would be?

19 A. Robbery, theft, running a red light, criminal acts  
 20 like that.

21 Q. Okay. Running a red light might not quite be there  
 22 but --

23 A. Yeah.

24 Q. -- but you're dead on. The State doesn't have to  
 25 show you that this person probably would go out into the world

1 and murder, one. Assault is a criminal act.

2 A. Yeah.

3 Q. I mean, beating up your wife could be a criminal act.  
4 So I don't want you to think that the State's trying to say  
5 that this person's got to be stopped from murdering in the  
6 future because that's just not the standard. And the third  
7 thing is this: Constituting a continuing threat to society.  
8 Well, what is society? I mean, who is in society?

9 A. The public.

10 Q. The public, right. People are in society.

11 A. Uh-huh.

12 Q. Okay. Some people might say, "Well, look, if this  
13 guy's in prison for the rest of his life, how's he really gonna  
14 be a continuing threat to society? He's in prison." What  
15 would your answer be to that?

16 A. He couldn't.

17 Q. Well, let me ask you this. Who else is in prison?

18 A. Oh, yeah, the officers.

19 Q. Okay. Police or prison guards, officers. What about  
20 staff? What about people like maybe nurses, or people who  
21 serve the food --

22 A. Maintenance.

23 Q. -- stuff like that? Maintenance. Exactly. Would  
24 those people be society?

25 A. Yes.

1 if he was really nice to his grandmother. I mean, it could be  
2 anything. You just have to be able to consider things that  
3 would possibly mitigate the punishment. You need to consider  
4 the circumstances of the offense, you need to be able to  
5 consider character and background, and personal moral  
6 culpability, which is kind of a weird way, I think, of saying,  
7 blameworthiness, how blameworthy is this person in this case.  
8 Can you think of any mitigating circumstances?

9 A. No, not really.

10 Q. Can you commit to thinking about whether there are  
11 mitigating circumstances and leaving your mind open to the  
12 possibility that the defense could raise them?

13 A. Yeah.

14 Q. Okay. Now, I want to give you an example about two  
15 different kinds of crimes kind of just to talk about this  
16 issue. The judge talked about it a little bit, but I want to  
17 talk to you about two different kinds of murder, okay? Let's  
18 say that two people walk into a hospital on a given day, right?  
19 And one guy walked into a hospital room and he looks at the  
20 unconscious body of his wife. And let's say that his wife has  
21 been cheating on him, okay, and he's found this out. He found  
22 out because she got in a car wreck and now she's unconscious  
23 and she was knocked out with her other lover. And let's say  
24 that this guy has kind of found out about this earlier and he's  
25 taken out a really big insurance policy on his wife, right? So

1 Q. Okay. So just because a person is locked up in  
2 prison, it doesn't necessarily mean that they're not gonna hurt  
3 anybody else?

4 A. Yeah.

5 Q. Okay. That's pretty much it on the first Special  
6 Issue. Do you have any questions about any of that stuff we  
7 just went over?

8 A. No, sir.

9 Q. Let's talk about that one real quick. Could you read  
10 that to yourself and then we'll talk about it.

11 A. Okay. I'm done.

12 Q. Okay. Basically, what this one is saying is -- well,  
13 first of all, when you're on the jury, if you answer Special  
14 Issue No. 1 no, you don't think he's gonna be a future danger,  
15 that kind of stops the process right there. This question  
16 doesn't have to be answered. But let's say that you answer  
17 Special Issue No. 1 yes. Yes, we, the jury, think he's going  
18 to be a future danger to society, you go to that one. And  
19 basically, what this one says is that after you take into  
20 consideration all the evidence, do you think that there are  
21 mitigating circumstances to say that there should be a life  
22 sentence instead of a death sentence? Mitigating circumstances  
23 pretty much just mean circumstances that would make less severe  
24 what's going on. It really could be anything. I mean, I could  
25 give you examples of it. It could be this guy was a Boy Scout,

1 he doesn't want to see his wife alive. He's upset and he's  
2 angry with his wife as to what she did and he's been hoping  
3 that she dies for a long time, and when no one's around, he  
4 yanks the plug out of the wall and the breathing machine stops  
5 and she dies. All right. He causes her death. That's murder,  
6 he did it for a bad reason and he was angry about it. Right?  
7 That's reason number one.

8 But let's say that in the second hospital room  
9 across the hall, a guy walks in and sees his wife of 40 years  
10 lying in a coma. The doctors told him that the prognosis is  
11 really bad. She's not gonna come out of it. And the problem  
12 with this though is that for some reason she still feels a  
13 whole lot of pain. Actually, she's in incredible agony. And  
14 despite the fact that she's mostly unconscious, he can  
15 actually see her wincing and crying and stuff. When no one's  
16 around, he pulls out the plug and she dies. That's -- I mean,  
17 as weird as that sounds, that's actually murder and that's  
18 intentionally taking a human life.

19 What do you think the differences are between  
20 those two different crimes?

21 A. Well, one's done out of hate, the other one's done  
22 out of feelings.

23 Q. Okay. That's true. How does that change them in  
24 your mind?

25 A. Probably one -- the one that killed with the pain is

1 probably did it for a good reason out of his mind.

2 Q. Okay. So if you were on a jury and it was your job  
3 to consider both of those crimes, do you think that you would  
4 give the same punishment in both cases?

5 A. No.

6 Q. Okay. So what you just did is consider mitigating  
7 circumstances and you considered aggravating circumstances. In  
8 the one case you have a bad guy who wants to get maybe  
9 insurance money and is kind of angry that his wife's cheating.  
10 Those possibly are aggravating circumstances.

11 A. Okay.

12 Q. And in the other case, you considered a guy who was  
13 pretty pathetic and who loved his wife and felt sorry for her  
14 and didn't want her to be in pain. Those possibly could be  
15 mitigating circumstances. So I just want to make sure that  
16 we're clear on that issue. Do you have any questions about  
17 that?

18 A. No, sir.

19 Q. Okay. I want to go over a couple of legal issues  
20 with you. The first one has to do with the indictment. To get  
21 here, this defendant had to be indicted by a grand jury. But  
22 that's pretty much just a group of people -- a group of people  
23 sitting around deciding whether or not the police officers had  
24 enough reason to file charges, okay? It's not in any way  
25 evidence of guilt. So it's not actually something that you can

1 talked about this also briefly. It's beyond a reasonable  
2 doubt. It used to be that we could tell you what that meant  
3 because there was a definition but there's not. The definition  
4 was kind of confusing anyway. But basically, if after you hear  
5 all the evidence, ask yourself if you have any doubt about it.  
6 If you have a doubt -- if you don't have a doubt, you don't  
7 have a doubt, there's nothing to worry about it. If you do  
8 have a doubt, next, ask yourself if you have a reason for the  
9 doubt. And I don't mean a reason like you feel sorry for  
10 somebody, or maybe because you were tired that morning you  
11 didn't hear everything. I mean maybe you didn't believe the  
12 witness or something like that. So the issue is do you have a  
13 doubt. If no, that's it. If you do have a doubt, ask yourself  
14 if you have a reason for that doubt.

15 A. Okay.

16 Q. And another issue that comes up is the presumption of  
17 innocence. Now, right now, as this defendant sits here, like  
18 the judge said, if you had to vote right now, you'd have to  
19 vote not guilty. The reason for that is because you haven't  
20 heard any evidence. But the way that that works is, through  
21 the trial, you have to -- the presumption has to be that this  
22 defendant is innocent. You can't say, "Well, he was charged so  
23 he's probably guilty." I mean, you're just not supposed to do  
24 that. Now, once you've heard evidence and it convinces you of  
25 his guilt, well, that's it. That presumption of innocence is

1 consider against him.

2 A. Okay.

3 Q. Are you okay with that?

4 A. Yes, sir.

5 Q. Okay. Another thing that we need to cover is I think  
6 the judge went over it briefly with you but it's the Fifth  
7 Amendment. And what it says is that this defendant doesn't  
8 actually have to testify. I mean, it's his Fifth Amendment  
9 right not to testify if for whatever reason he decides not to,  
10 or his lawyers decide it's a bad idea for him to and they tell  
11 him he shouldn't testify. But here's the catch. If he doesn't  
12 testify, you can't consider that as a circumstance against him  
13 which means that if the State puts on its case and the defense,  
14 for whatever reason chooses not to testify, and you go back in  
15 that room, you can't say, "Man, I'm kind of close, but you  
16 know, that guy didn't say anything so I'm just gonna give it to  
17 the State."

18 A. Yeah.

19 Q. Or you can't say, "You know, I wonder what he didn't  
20 say." It's not something you guys can talk about. Can you  
21 promise that you'll do that? I mean, can you promise that you  
22 won't consider that against him?

23 A. Yes, sir.

24 Q. Okay. Another issue that's gonna come up and always  
25 comes up is the burden of proof in this case and the judge

1 gone. It's not like -- it's not like a shield that he gets to  
2 carry with him forever and ever. It's almost like a bubble  
3 around him. And once you hear some evidence that convinces you  
4 of his guilt, it sort of like pops the bubble and that  
5 presumption is gone.

6 Do you have any questions about that?

7 A. No, sir.

8 Q. Okay. Oh, and I'm sorry, there's one more thing I  
9 want to go over with you. It has to do with intoxication.  
10 Sometimes you might hear during a trial that a person became  
11 intoxicated and that's why they committed the crime. Voluntary  
12 intoxication is never a defense to a crime. You can't say,  
13 "Well, I got really drunk and that's the reason I beat that  
14 person up." I mean, if you got drunk on purpose then  
15 everything that you did while you were drunk, the law says  
16 basically you did it, right?

17 A. Okay.

18 Q. And so it's never a defense to crime, right?

19 A. Yeah.

20 Q. But perhaps it could be a mitigating issue like the  
21 stuff we talked about in Special Issue No. 2. But voluntary  
22 intoxication, getting drunk or getting high or stoned or  
23 whatever on purpose, never a defense.

24 I want to talk to you a little bit about some of  
25 this stuff from your questionnaire. You said -- you said

1 someone here – there was something that said, "Please complete  
 2 the following sentences. The best argument for the death  
 3 penalty is" – and you wrote none. And then it says, "The best  
 4 argument against the death penalty is" -- and you also wrote  
 5 none.

6 A. Uh-huh.

7 Q. Now that we've talked to you and I talked to you and  
 8 the judge has talked to you, what do you think you would say  
 9 about that? What do you think the best argument for the death  
 10 penalty is?

11 A. I guess how bad the crime is to tell you the truth.

12 Q. Okay. What about specifically taking a person out of  
 13 the mix, out of society so they can't do anymore harm?

14 A. Okay.

15 Q. Do you think that's a good reason also?

16 A. Uh-huh.

17 Q. Okay. What do you think is a good reason not to have  
 18 the death penalty?

19 A. I don't know. I don't know.

20 Q. Okay. Can I ask you another question? I know -- I  
 21 saw that you in your questionnaire wrote that you were a kayak  
 22 fisherman?

23 A. Yeah.

24 Q. Where do you do that?

25 A. Here.

1 Q. Okay. That kind of makes you like the boss, right?

2 A. Yeah.

3 Q. And you're in charge of like I think you said 14  
 4 people?

5 A. Fourteen people.

6 Q. Okay. I think that's all I have for you. Do you  
 7 have any other questions for me?

8 A. No, sir.

9 Q. Well, I think the defense will ask some questions to  
 10 you. Thanks.

11 A. All right.

12 MR. GARZA: May I proceed, Your Honor?

13 THE COURT: You may.

14 VOIR DIRE EXAMINATION

15 BY MR. GARZA:

16 Q. Good afternoon, Mr. Hill. My name is Ed Garza and I  
 17 represent John Henry Ramirez. My co-counsel here is Mr. Grant  
 18 Jones. I think I had previously introduced myself to you and  
 19 the other members of the panel when we were all downstairs  
 20 back, I think, on November 3rd or something like that.

21 A. Yes, sir.

22 Q. In Texas, when a person accused of a crime decides  
 23 that they want a trial by jury, they're entitled to have the  
 24 evidence in their case heard by 12 impartial jurors, okay?

25 What does impartial mean to you?

302

304

1 Q. Do you do that out like by the T-heads and stuff?

2 A. No, out towards the back of Mustang Island.

3 Q. Okay. Is it a surf kayak?

4 A. No, it's a big kayak.

5 Q. Just like a big, long kayak?

6 A. Yeah.

7 Q. Do you do fly fishing stuff or do you do bait  
 8 fishing?

9 A. I'm picking it up but I'm not into that yet.

10 Q. Okay. Mostly just bait stuff?

11 A. Lures.

12 Q. Lures. Okay. Oh, and you work for Horton, right?

13 A. Yes.

14 Q. And you've been there for kind of a long time?

15 A. Uh-huh, going on 14 years.

16 Q. Okay. Are you -- does it say led man or lead man?

17 A. Lead man.

18 Q. You're a lead man?

19 A. Yeah.

20 Q. Okay. What does that mean you do?

21 A. I just kind of did a work order for my supervisors on  
 22 what my crew has to do and I just got to make sure they follow  
 23 through with it. Certain jobs have got to go out on certain  
 24 days, you know, we just got to make sure everything goes out on  
 25 a specific date.

1 A. I really don't know. Same as others.

2 Q. Do you -- you don't know what impartial --

3 A. Impartial, no.

4 Q. Impartiality means that you come to the task or  
 5 you're going to ask to sit there and listen to the evidence and  
 6 not have any preconceived notions or any preconceived opinions  
 7 about the case until you hear the evidence. That's what  
 8 impartiality means.

9 A. Okay.

10 Q. It means you're fair to both sides. You haven't  
 11 formed an opinion, you know, for or against either side. Does  
 12 that --

13 A. Okay. That makes sense.

14 Q. -- make sense to you now?

15 A. Yes, sir.

16 Q. And as my client sits here today, do you think he's  
 17 guilty or innocent?

18 A. Innocent.

19 Q. So that is what's called the presumption of  
 20 innocence.

21 A. Okay.

22 Q. Okay. That's what we mean by the presumption of  
 23 innocence. And like Mr. Schimmel tried to tell you or give you  
 24 an example of it, right now he's -- he's surrounded by a magic  
 25 bubble or a bubble that you could imagine being the presumption

1 of innocence, okay? And until it's punctured or he no longer  
 2 enjoys that protection, okay, that's what we're trying to get  
 3 you to understand that that is the presumption of innocence.  
 4 Okay. We're not saying that it cannot be overcome the  
 5 presumption, if it possibly can, you know. We want to know  
 6 that you're coming to the task, you're coming in here, if we  
 7 decide to pick you as a juror, without any pre-formed biases or  
 8 any leanings, that you're leaning one way or the other.

9 A. Okay.

10 Q. Is that fair enough?

11 A. Yeah.

12 Q. Is that you?

13 A. Well --

14 Q. Maybe?

15 A. Yeah. You kind of said you can't lean one way or the  
 16 other and I already told you, yeah.

17 Q. Okay. So it means you're not leaning one way or the  
 18 other, are you?

19 A. Yeah.

20 Q. Are you?

21 A. There are trick questions here. No.

22 Q. Oh, I'm not even -- I haven't even started these.

23 A. Okay.

24 Q. I'm just getting warmed up. Remember that movie?

25 I'm just getting warmed up. Okay. Let's just say this. In so

1 A. They do.

2 Q. The State does, don't they? They have to prove it to  
 3 you beyond a reasonable doubt. So what do we mean by  
 4 reasonable doubt? Let me give you an example. Say Horton  
 5 wants to send you to Houston because they need you to go buy  
 6 some parts.

7 A. Uh-huh.

8 Q. And they're gonna fly you over there, you've got to  
 9 get to the airport, you're gonna get on the plane. Do you have  
 10 any reasonable doubt that that plane is hopefully gonna get you  
 11 to Houston --

12 A. No.

13 Q. -- that morning? All right. You're counting,  
 14 praying, whatever, or it's not even entered your mind that,  
 15 hey, more likely I'll get to Houston, get my job done, and come  
 16 back, right?

17 A. Yeah.

18 Q. So you don't have any reasonable doubt, you know,  
 19 that Southwest Airlines is probably a pretty good airline, they  
 20 have a good record, they'll get you to Houston and they'll get  
 21 you back, right?

22 A. Yes.

23 Q. All right. Let me change the facts a little bit for  
 24 you. Say that morning you're waiting around and you decide to  
 25 go to the restaurant and have a little breakfast. And while

1 far as what we mean by biases or leanings, let's say you are  
 2 John Henry's uncle and that you're family. Could you be a  
 3 juror in his kind of a case?

4 A. No.

5 Q. Why? Because?

6 A. Blood.

7 Q. Blood. And there's a family bias, right?

8 A. Yeah.

9 Q. Let's say you're on trial for DWI. Would you like to  
 10 have a state trooper on your jury?

11 A. No, sir.

12 Q. Why not?

13 A. Because it's his job to put away those kind of  
 14 people.

15 Q. There's an occupational bias, isn't there?

16 A. Yeah.

17 Q. What if you were on trial for arson, would you want  
 18 to have a fireman on your jury?

19 A. No.

20 Q. One more example of that, right? Okay. So what  
 21 we're looking for is people that are unrelated, unconnected,  
 22 unplugged, you know, to this whole situation that are going to  
 23 listen to all the evidence in this case in the first part of  
 24 the trial which is the guilt or innocence, okay? Now, who has  
 25 the burden of proof in this case?

1 you're there, this guy dressed up like a pilot walks in there  
 2 and starts slamming back some martinis, about six or seven,  
 3 okay?

4 A. Uh-huh.

5 Q. And you're watching him do this the whole time. Then  
 6 they call your flight and they want you to, you know, head to  
 7 the plane. And as you're getting there, all of a sudden,  
 8 here's this guy greeting you, welcome on board, welcome on  
 9 board. Are you gonna fly with that guy?

10 A. No.

11 Q. Why?

12 A. Because he's pretty much drunk.

13 Q. Without a doubt?

14 A. Yeah.

15 Q. A doubt based on reason where in your own sense and  
 16 in your own witness you saw him drinking?

17 A. Uh-huh.

18 Q. Right? Do you follow the concepts?

19 A. Yes, sir.

20 Q. All right. Now, this is a capital murder. That's  
 21 real important. It's real serious because we're talking about  
 22 a case where the State of Texas has already informed you that  
 23 if they can prove this case against our client, then you're  
 24 going to have to decide his punishment, okay?

25 A. Okay.

1 Q. And there's only two punishments provided by our  
 2 legislature for these kind of cases, and it it's either life in  
 3 prison or the death penalty, okay? You've heard of these  
 4 situations coming out of Dallas where a bunch of people now  
 5 have been getting found factually innocent of cases that they  
 6 were convicted of many years ago and had to serve a lot of  
 7 prison time and they found out through DNA that they didn't  
 8 have anything to do with the crime --

9 A. Uh-huh.

10 Q. -- that they were charged with. Have you ever read  
 11 about that?

12 A. Yeah, I read something.

13 Q. Seen some stuff on it? How does that make you feel  
 14 for those persons?

15 A. Just sad knowing that they had to be there.

16 Q. Pretty bad, right?

17 A. Yeah.

18 Q. Part of what they have had to endure, though, is that  
 19 they're still alive and now have been released, okay?

20 A. Uh-huh.

21 Q. But in a death penalty case, you know, if everything  
 22 goes wrong for our client -- which is why it's so important  
 23 that we get it right, and for some reason there's some sort of  
 24 DNA results later on that might exonerate him, but if he's  
 25 already been put to death -- you know, what I mean?

1 Q. Not at all?

2 A. Huh-huh.

3 Q. Okay. The reason we have to talk to you about all  
 4 this is, is because this is the only time we get a chance to  
 5 talk to you about it all.

6 A. Okay.

7 Q. So we have to know how you feel, what you're  
 8 thinking, and what you can give effect to with respect to these  
 9 legal concepts, okay? It's real important.

10 Let me kind of shift gears a little bit with  
 11 you here. We've already discussed with you these Special  
 12 Issues over here and that's to say that we get to the point in  
 13 the case where it's been proven that, you know, perhaps our  
 14 client did commit this crime, and you make a finding of guilt.  
 15 Then you're going to be asked to decide his punishment, like I  
 16 had previously mentioned. And depending on how you answer  
 17 these special issues depends on whether he gets a life  
 18 sentence or death, right?

19 A. Uh-huh.

20 Q. And how do we achieve that? How do we get to that  
 21 point?

22 A. You're asking?

23 Q. Uh-huh.

24 A. I guess the evidence.

25 Q. Okay. Well, he has to be found guilty first of

1 A. Yeah.

2 Q. -- what good does it do us?

3 A. Yeah.

4 Q. So it's important that we get it right. Don't you  
 5 think?

6 A. Yes, sir.

7 Q. Okay. And that's what we need to know. Are you the  
 8 kind of person that can give this kind of a case the -- the  
 9 sincere conscientious effort to listen to all the evidence  
 10 before you make up your mind?

11 A. Yes, sir.

12 Q. Can you do that?

13 A. Uh-huh.

14 Q. The reason we have to talk about all this stuff, it  
 15 may make you think that why are they talking about all this  
 16 stuff, you know. We haven't even heard any of the evidence.  
 17 You know, they're already talking about this man's guilt and  
 18 the death penalty. Is there anything about that that bothers  
 19 you or anything?

20 A. No, just --

21 Q. Does it make you presuppose anything?

22 A. No.

23 Q. Does it make you think that if he's been indicted in  
 24 this case he's probably guilty of it?

25 A. No.

1 capital murder, right?

2 A. Yeah.

3 Q. But if he doesn't get found guilty of capital murder,  
 4 say he just gets found guilty of murder, or say he gets found  
 5 guilty of robbery, then we don't even get to this Special  
 6 Issue. We're gonna have to make a determination as to what  
 7 would be an adequate punishment for either one of the two  
 8 crimes. And if they don't prove the capital murder then we're  
 9 talking about a whole different ball game; do you understand?

10 A. All right.

11 Q. Do you understand that?

12 A. Yeah.

13 Q. If they do prove the capital murder, it has to be  
 14 beyond a reasonable doubt before we even get to these issues,  
 15 okay?

16 A. Okay.

17 Q. Now, what are some of the things that you would want  
 18 to hear or consider as evidence in making a determination of  
 19 whether or not a person is a future threat to society, which is  
 20 that Special Issue No. 1?

21 A. Yeah. How was he before he committed the crime if he  
 22 did.

23 Q. Like, was he a bad person?

24 A. Yeah.

25 Q. Was he a good person? Did he commit other crimes?

1 Is he --  
 2 A. Yeah.  
 3 Q. Does he have a history? Are those the kind of things  
 4 you would look for?  
 5 A. Yes, sir.  
 6 Q. I mean -- and I don't want to pin you down to any one  
 7 thing or the other, but in other words, I want to know some of  
 8 the things you would need to be convinced of that Special  
 9 Issue.  
 10 A. What kind -- what he did with his life.  
 11 Q. Okay. Let's go to this Special Issue No. 2 and ask  
 12 you -- if you'll read it to for yourself and let me know when  
 13 you're done reading it.  
 14 A. Okay.  
 15 Q. Is there anything you've read that you don't  
 16 understand any of the words or anything?  
 17 A. The last paragraph where "is there a significant  
 18 mitigating" --  
 19 Q. Yeah. That word?  
 20 A. He kind of explained it to me.  
 21 Q. Mitigating is kind of a difficult word to understand  
 22 and you don't see it every day maybe unless you're a lawyer and  
 23 you've studied what it means, okay? But what mitigating means  
 24 is the opposite of aggravating, okay? Aggravating can be  
 25 something really terrible, really bad, okay? Like our client's

1 character? That's what we're talking about.  
 2 A. Yeah.  
 3 Q. A person's character. Like how would you feel if I  
 4 told you I thought you were a person of good character? What  
 5 would I be saying about you?  
 6 A. Something about me, something good.  
 7 Q. Right.  
 8 A. Yeah.  
 9 Q. What about a person's background?  
 10 A. Where they grew up, what kind of job they have,  
 11 something like that.  
 12 Q. Something productive?  
 13 A. Schooling, yeah.  
 14 Q. What about if he didn't have any of that? What if he  
 15 had a bad background? What if he came from an abused family?  
 16 What if he came -- what if he was a person of bad emotional  
 17 history, bad family history, maybe even some history of mental  
 18 retardation, drug usage, things of that nature?  
 19 A. Uh-huh.  
 20 Q. What we need to know is are those things that you can  
 21 give effect to in making a determination as to our client's  
 22 blameworthiness in this case?  
 23 A. Okay.  
 24 Q. Now, doesn't -- it doesn't mean are those things that  
 25 we want you to consider as to his guilt or innocence because at

1 got several convictions for assaults and robberies and beating  
 2 people up, shooting people or knifing people, just, you know, a  
 3 terrible record. That would be something aggravating, okay?  
 4 A. Okay.  
 5 Q. Mitigating would be something like, well, what if our  
 6 client -- let me see -- had been an A student. What if he had  
 7 been an Eagle Scout? What if he had been a decorated war hero?  
 8 What if he had a tremendous military record? What if he was a  
 9 community organizer? What if he was a person that, you know,  
 10 helped kids, okay?  
 11 A. Uh-huh.  
 12 Q. Those would be some factors of his good character,  
 13 right? And so, see, up there at the very top where you're  
 14 asked about the whole circumstances of the offense, and the  
 15 defendant's character and his background, what do you -- what  
 16 do you -- what comes into your mind as something that you would  
 17 consider about a person's character?

18 A. Did he play any sports, something like that.  
 19 Q. Okay. What about his -- what about him being a good  
 20 guy, a truthful person, a person you can depend on, a person  
 21 that was honest, a person that you would see and just, you  
 22 know, have a smile brought upon your face and you would say,  
 23 "Hey, I know that guy, he's always been a good dude."  
 24 A. Yeah.  
 25 Q. He's always been a good guy. Isn't that his

1 this point, you've already found him guilty, okay? We're not  
 2 asking you to use those tools as a way of confirming in your  
 3 own mind whether or not he's guilty or not.  
 4 A. Uh-huh.  
 5 Q. Because you've already done that.  
 6 A. Yeah.  
 7 Q. Okay. What we're asking you to do is use those  
 8 factors, that evidence in assisting you in making a  
 9 determination of whether or not he needs the worst punishment  
 10 available, which would be death, or those factors that make a  
 11 difference to you in whether or not he should have his life  
 12 spared.  
 13 A. Okay.  
 14 Q. Okay? In other words, does it assist you in  
 15 hammering him or do those factors make a difference in your  
 16 mind of where you say, well, you know what, I think there's  
 17 some mitigating circumstances in those matters that would  
 18 require me to say, hey, he needs a break?  
 19 A. Okay.  
 20 Q. I'm not gonna give the death penalty to him. I think  
 21 he deserves maybe a life sentence. Do you understand where I'm  
 22 going with that?  
 23 A. Yeah, I understand.  
 24 Q. Could you do that?  
 25 A. Uh-huh.

1 Q. Could you think about those things? That's -- that's  
 2 what -- that's what give effect means. Can you think about it?  
 3 Will you consider them?

4 A. Okay.

5 Q. I'm not asking you to do it.

6 A. Yeah.

7 Q. Because you might not want to. That's your duty as a  
 8 juror, but I do need to know whether or not you'd consider  
 9 those things. Because some people might say -- and they come  
 10 in here and say, "Well, you know, if the guy grew up in the  
 11 barrio, or he grew up in the ghetto, or, you know, was always  
 12 hungry, didn't have good parents, or you know, he was abused or  
 13 I don't care about all of that, I don't care, doesn't make any  
 14 difference to me," well, that's a person that cannot consider  
 15 those things, okay?

16 A. Okay.

17 Q. And at the same time, of course, we're also asking  
 18 you to consider the circumstances of the offense, you know,  
 19 which may be pretty bad, okay? But, also, his character and  
 20 his background which might also be pretty bad, but bad in the  
 21 sense that there were things that he didn't necessarily want to  
 22 happen to him they did. They happened to him. You know,  
 23 nobody wants to grow up an abused child do you think?

24 A. Yeah.

25 Q. Nobody wants to grow up with drug addiction do you

1 Q. Okay?

2 A. All right.

3 Q. That's what we mean by all that mumbo jumbo, you  
 4 know, for lack of a better way to call it, okay?  
 5 A. Okay.  
 6 Q. But we need to know that you understand those  
 7 concepts. Can you consider those things?

8 A. Yes.

9 Q. You can consider them the wrong way or the right way.  
 10 It doesn't -- you know, it doesn't matter. But we need to know  
 11 that you'll give some effect to it and think about it, and that  
 12 you won't just automatically disregard it?

13 A. Okay.

14 Q. It has to do with what the judge was asking you to do  
 15 as to whether or not you can follow the oath, you know, follow  
 16 the oath as to the first part of the jury trial and follow your  
 17 oath as to the second part of the jury trial?

18 A. Okay.

19 Q. Have I confused you?

20 A. No, no, I'm fine.

21 Q. Have I made it a little more understandable  
 22 hopefully?

23 A. Yeah.

24 Q. Okay. Now, I'm gonna ask you another critical tricky  
 25 question. Since our law provides the death penalty as a

1 think?

2 A. No.

3 Q. Some people might. I mean, I don't know. I mean,  
 4 it's a choice. But it may not be one that really don't have --

5 A. Yeah.

6 Q. -- that much of a choice because it's what you see  
 7 day in day out.

8 A. Yeah.

9 Q. You know what I mean?

10 A. Yeah.

11 Q. You know, in our family -- maybe in your family your  
 12 mother and father, your family, your aunts your uncles, your  
 13 teachers, your church may have made a big difference in your  
 14 life, okay?

15 A. Okay.

16 Q. Some people might not have had that. Not might have  
 17 had it. They might not have been exposed to any of those  
 18 things, okay? And all we're asking you to do is in asking you  
 19 to consider those things in determining not his guilt because  
 20 you've already done that, but how guilty is he. Is he so  
 21 guilty that you feel like, man, you know, they just need to  
 22 take this poor guy outside and shoot him away, or God, you  
 23 know, I just -- the guy never had a chance in his life and we  
 24 need to give him one by giving him a life sentence instead.

25 A. Okay.

1 punishment or as a sanction for the people that, you know,  
 2 might get found guilty of that behavior, do you think that we  
 3 as a society benefit from the death penalty?

4 A. No.

5 Q. Why not?

6 A. We're still taking somebody's life.

7 Q. Still a pretty awesome responsibility --

8 A. Yeah.

9 Q. -- isn't it? In that some people seem to say that,  
 10 "Well, I think there is a benefit, one, it deters crime." The  
 11 other, "It takes this person out of society to where we never  
 12 have to worry about him again at all." Some people say that.

13 A. Yeah.

14 Q. Okay. Is that such a benefit -- is it such a good  
 15 benefit that say that one out of 300 people that we execute  
 16 could possibly be an innocent person, would that be something  
 17 you could live with?

18 A. If he was innocent, no.

19 MR. GARZA: Okay. I have no other questions,  
 20 Your Honor. Thank you.

21 THE COURT: Anything else?

22 MR. SCHIMMEL: May I have one or two  
 23 questions, Your Honor?

24 THE COURT: Sure.

## 1 VOIR DIRE EXAMINATION

2 BY MR. SCHIMMEL:

3 Q. Mr. Hill, when we started talking and I asked you how  
 4 you felt about the death penalty, you said you had mixed  
 5 feelings. Is that kind of what your mixed feelings were about?

6 A. Yeah. I really don't have a clear-cut answer to, you  
 7 know, how I feel about it. It's -- I mean, I really don't know  
 8 to tell you the truth.

9 Q. What would you do if -- if you weren't a fabricator  
 10 but you -- let's say that you were a lawmaker and that you  
 11 worked in Austin. And let's say that the vote came up to take  
 12 the death penalty law off the books, we're gonna just get rid  
 13 of it completely. What would you vote for?

14 A. I would probably take it off.

15 Q. You would?

16 A. Yeah.

17 Q. You just now -- you said to Mr. Garza that you didn't  
 18 think society would benefit from the death penalty. Have you  
 19 felt that way for a long time?

20 A. No. I mean, it's -- I guess it's basically on the --  
 21 on the issue itself. Like, I mean, I hear some people -- I  
 22 mean, I hear some crimes that are worse and they don't even get  
 23 the death penalty, and you know, others that do, so it's kind  
 24 of up there in the air. You just really don't figure it out  
 25 when it comes to that.

1 THE COURT: All right. Anything else?

## 2 VOIR DIRE EXAMINATION

3 BY MR. GARZA:

4 Q. I notice you work at Horton Automatics. Do you know  
 5 Bob Beckett?

6 A. Bob Beckett. The name doesn't call me.  
 7 Q. It doesn't ring a bell?

8 A. It doesn't ring a bell.

9 MR. GARZA: Okay. All right.

10 THE COURT: Why don't you wait in the jury  
 11 room and we'll be with you shortly.

12 (Venireperson exits courtroom.)

13 MR. SKURKA: May we have just a moment, Your  
 14 Honor?

15 THE COURT: Okay.

16 MR. SCHIMMEL: Your Honor, the State will use  
 17 a strike on this juror.

18 THE COURT: Okay. Let's bring him in.

19 (Venireperson enters courtroom.)

20 THE COURT: All right. Mr. Hill, you were not  
 21 selected to be on this jury but we do appreciate you spending  
 22 the day with us essentially. Sorry we were running behind.

23 VENIREPERSON NO. 80: All right.

24 THE COURT: Thank you.

25 MR. GARZA: Thank you.

322

324

1 Q. Have you thought about much before today?

2 A. No.

3 Q. So --

4 A. It only comes up when something happens like this  
 5 through, you know, in the news or something like that.

6 Q. Is what you're saying basically that it just depends  
 7 on the crime?

8 A. It depends on, you know, what they did really.

9 Q. Okay. So some crimes you would say would be  
 10 appropriate for it, some crimes you think it wouldn't?

11 A. Yeah. That's pretty much the way I feel, but if you  
 12 would ask me, could I deal with it not being there, yeah.

13 Q. Okay. And you think the world might be a better  
 14 place if it weren't there?

15 A. I don't know about a better place. I mean, but --

16 Q. But if you were on the legislature you might vote to  
 17 get rid of the law?

18 A. To get rid of it.

19 Q. Instead just have life?

20 A. Yeah, see that's what I'm saying. I mean, if you  
 21 would ask me if I had a chance to get rid of it, yeah, I would  
 22 get rid of it. But are there cases where some people need it  
 23 or deserve it, then, yeah, I see that too, but I just think  
 24 altogether we can do without it.

25 MR. SCHIMMEL: Okay. Thank you, sir.

1 THE COURT: All right. You want to take five.

2 Let's take five and we'll hit it again.

3 MR. SKURKA: That was No. 6 for us. I have  
 4 No. 5 for us.

5 THE COURT: That's 6. 5 was Clara Muguerza.  
 6 (Recess.)

7 THE COURT: All right. Antonio Martinez is  
 8 the next person No. 49.

9 VENIREPERSON NO. 49,  
 10 ANTONIO G. MARTINEZ, JR.,

## 12 VOIR DIRE EXAMINATION

13 BY THE COURT:

14 Q. All right. Mr. Martinez, come forward. Have seat  
 15 here. I'm real sorry we're behind.

16 A. That's okay.

17 Q. But this is a serious case and we're giving it the  
 18 attention it really deserves, okay?

19 Now, we're looking for jurors that can keep an  
 20 open mind, okay? Some people can't because maybe they've  
 21 heard something or whatever. You know, some people can't keep  
 22 an open mind. They feel like someone is charged with a crime  
 23 then they must be guilty. But I need to know if you can keep  
 24 an open mind?

25 A. I believe so.

1 Q. Okay. All right. Nothing pointing the other way?

2 A. No.

3 Q. Okay. Let's see here. You haven't heard anything  
4 about the case in the media. Let's talk about the law. We  
5 need to make sure you can follow the law.

6 A. Okay.

7 Q. You haven't been on the jury before which is fine.  
8 No experience necessary here, okay?

9 A. Good, because I have none.

10 Q. That's all right. In every criminal case, the  
11 burden's on the State of Texas to prove the case. The law  
12 says, "State, you charged it, you got to prove it." Okay. You  
13 agree with that law?

14 A. Yeah.

15 Q. The burden of proof is on them. The burden of proof  
16 is beyond a reasonable doubt. You probably remember that from  
17 school or maybe you watch *American Justice* or something like  
18 that, okay? But, in any event, that's the highest burden that  
19 we have in all of the law in Texas. I like to -- we have no  
20 definition, but I like to illustrate to jurors what it is by  
21 telling them what it's not. It's not preponderance of the  
22 evidence. That would be the standard in a civil case. That's  
23 like 51 percent. It's not clear and convincing evidence, which  
24 is higher than that. That's the burden of proof that the State  
25 would have if they were trying to remove children from a --

1 A. If I was given all the evidence and I don't think  
2 they met their burden, I'd vote that way. I'd say, hey, you  
3 haven't convinced me.

4 Q. That's right. So you'd vote not guilty. I had -- I  
5 had a juror on a case two trials ago that said -- saw me at a  
6 wedding and he said, "You know, we thought he was guilty but we  
7 didn't think they had proven the case beyond a reasonable doubt  
8 so that's why we acquitted him." There was nothing wrong with  
9 what they did.

10 A. That's --

11 Q. That's how the system works, okay, that's how it's  
12 supposed to work.

13 All right. As part -- intertwined in all this  
14 is the idea -- well, it's not the idea. It's in the  
15 Constitution that the defendant does not have to testify,  
16 okay? And it kind of makes sense because if the State's got  
17 the burden of proof, then the defense doesn't have to do  
18 anything, including putting their client on the stand. And  
19 they may believe the State hasn't proven their case and  
20 advised their client not to. There may be other reasons. You  
21 know, maybe he's not a good speaker, maybe he gets nervous,  
22 okay? Whatever. In any event, it doesn't really matter  
23 because the law says, not only can he not be called as a  
24 witness, but the State -- but the jury can't hold it against  
25 him.

1 take away somebody's rights to be a parent. Clear and  
2 convincing sound pretty strong since it's higher than that,  
3 okay?

4 On the flip side, beyond a reasonable doubt  
5 does not mean beyond all doubt, okay? It doesn't mean beyond  
6 a shadow of a doubt, okay? Because if you -- if you -- if it  
7 was beyond all doubt you probably would have seen the event  
8 occur, and then you'd be a witness not a juror?

9 A. Not a juror, yeah.

10 Q. Okay. Beyond a reasonable doubt. Okay. Can you  
11 follow that standard?

12 A. I believe so.

13 Q. All right. The law says this. The law says, Look,  
14 if the State's got to prove their case beyond a reasonable  
15 doubt to the jury, then the defendant's innocent until that's  
16 done, if it can be done. The law says he's innocent until the  
17 State proves otherwise if they can, all right? We ask the  
18 jurors, "Well, how would you vote right now?" Most people say,  
19 "Well, I can't vote because I haven't heard anything," and  
20 that's logical. But the correct answer is, "I'd have to vote  
21 not guilty because I haven't heard anything." But more real  
22 world, if the State -- we start trying this case and the State  
23 starts putting on their evidence and they can't -- they put on  
24 their case and you don't think they've met their burden, what  
25 would you do?

1 A. That makes sense.

2 Q. Okay. You can't go back there and say, "You know  
3 what, I didn't hear from him so, State, that's a point for  
4 you." You can't do that. Could you follow that law?

5 A. Yeah.

6 Q. All right. Good.

7 A. It makes sense. It's right.

8 Q. Okay. Now, let's talk a little bit about this case.  
9 The allegation is capital murder. And what's that? Well,  
10 certainly it's murder. And within the murder, of course, is  
11 the intentional taking of a life of another. Capital murder is  
12 like murder plus, okay? And the legislature has made a laundry  
13 list of what murders are capital. And capital, of course,  
14 means that the death penalty is a possibility. One of the ways  
15 the State can prove capital murder is if they prove a robbery  
16 or an attempted robbery, and in the course of doing so, a  
17 murder occurs, okay?

18 What's a robbery? Well, I hold up a gun to  
19 you and I say, "Hey, give me that book." That would be a  
20 robbery. I just robbed you. I threatened you with violence,  
21 or perhaps I forcibly took it from you, and that's robbery.

22 All right. The State can also get there on  
23 this issue with an attempted robbery, that is, I pull a gun on  
24 you and ask you for your -- tell you, "Give me that book," but  
25 you're a martial arts expert and you roundhouse keep me in the

1 face and knock me out, okay? Am I guilty of robbery? Well,  
2 no, but I am guilty of attempted robbery. Do you follow me?

3 A. Yeah.

4 Q. Okay. The law says that for the State to prevail  
5 they have to prove murder plus robbery, two serious felonies,  
6 and they've got to prove all the elements of both of them,  
7 okay? Robbery or attempted robbery.

8 A. Well, there's a lot at stake.

9 Q. There's a lot at stake here. This is serious, okay?

10 A. Yeah.

11 Q. And the law says that -- basically, it goes like  
12 this. On the given day alleged in the indictment, in Nueces  
13 County, Texas, the defendant committed, while in the course of  
14 committing a robbery or attempted robbery, committed the  
15 offense of murder, okay?

16 A. Uh-huh.

17 Q. And there's a lot of elements to it. There's two  
18 major crimes so there's all the elements plus, you know, the  
19 place and the time and the person. Would you require them to  
20 prove them, all the elements as the law requires?

21 A. Yes.

22 Q. Now, our legal system, the criminal system is a  
23 bifurcated system. All that means is there's two parts. Part  
24 one, guilt or innocence. Can the State prove beyond a  
25 reasonable doubt to the jury the charge? If the jury says, not

1 or not, you know? All those type things, okay?

2 A. Uh-huh.

3 Q. But you know you've got to consider that. "The  
4 personal moral culpability of the defendant." That's a  
5 mouthful, okay? And it's words we don't normally use. Let me  
6 see if I can explain this one to you. I'll use an example.  
7 Burglaries, two burglaries. One guy goes in, breaks into a  
8 house because he and his girlfriend want to go get high and  
9 drive to Las Vegas and party it up. And he goes in and he just  
10 trashes these people's house, takes all their TVs and  
11 computers. Their child had a video game system, took it --

12 A. I get you.

13 Q. -- and trashed the place. Been to prison twice  
14 before for burglary. All right. He gets caught. The other  
15 guy goes in and he just -- he's got three kids that are  
16 starving, pretty much, because he's lost his job and he has to  
17 feed them and he goes in and he gets food from the house.  
18 Doesn't break -- doesn't mess up anything, does the best he can  
19 to do the minimal amount of damage, okay?

20 A. Uh-huh.

21 Q. Do we punish them the same?

22 A. One guy stole --

23 Q. One guy stole to feed his kids.

24 A. The other guy stole --

25 Q. The other guy just trashed the house and just did it

1 guilty, case is over. But if the jury says guilty of capital  
2 murder, we go on to part two. Two possibilities, life in  
3 prison or death. Only two possibilities. But you don't say  
4 that. You don't -- the jury doesn't go back and deliberate on  
5 that, okay?

6 A. Okay.

7 Q. We answer questions. And here's the first one if  
8 you'll indulge me here. "Is there a probability that the  
9 defendant would commit criminal acts of violence that would  
10 constitute a continuing threat to society?" What does that  
11 mean? Well, we call this question the future dangerousness  
12 question, okay? Is it more likely than not that the defendant  
13 will commit, you know, violent acts towards others, okay, in  
14 the future? And you have to answer yes or no, okay?

15 A. Uh-huh.

16 Q. Then after answering that question, you go over here,  
17 "After taking into consideration all the evidence, including  
18 the circumstances of the offense" -- that's the first part of  
19 the case, guilt or innocence -- "the defendant's character and  
20 background," -- well, what's that? What's character? Well,  
21 the kind of person he is, is he a good guy, a bad guy? Is he a  
22 liar? Is he a truthful guy? Is he honest, you know?

23 -- "his background." What's that? Well, what  
24 was his childhood like? How did he grow up? Did he have a  
25 good family, did he have a bad one? Was he abused as a child

1 just to get high.

2 A. They both stole, they both committed a crime.

3 Q. They are both guilty.

4 A. Uh-huh.

5 Q. But the question is do we punish them the same?

6 They're both guilty. They both get convicted of burglary but  
7 do we punish those people the same?

8 A. I believe so.

9 Q. Really?

10 A. Yes.

11 Q. You think that -- you think that someone whose been  
12 to prison twice before for the same crime should get the same  
13 punishment for someone whose never been in trouble their entire  
14 life?

15 A. If you've committed a crime, you should be punished  
16 worthy of that crime.

17 Q. Exactly, exactly. But you don't think that -- you  
18 don't think that you look into the circumstances of the  
19 background of the person? I mean, some people --

20 A. Am I trying to justify it?

21 Q. No, no. They're gonna get punished. Maybe one of  
22 these goes to prison, maybe one of them gets probation, okay?  
23 Maybe one of them gets two years in prison, maybe the other  
24 gets 20 years in prison, but there's a difference; do you  
25 agree?

1 A. Between two and 20, yes.

2 Q. No, I mean between these two cases?

3 A. Yes, there is a difference.

4 Q. Okay. And you might give two years to the guy who  
5 stole -- maybe you'd give him probation even if you think it's  
6 appropriate. I'm not trying to suggest what you give this guy.  
7 What I'm trying to suggest is it's different and that the  
8 person's personal moral culpability is different. Do you agree  
9 with that?

10 A. I do.

11 Q. Okay. That's that. "Is there sufficient mitigating  
12 circumstance or circumstances that warrant life rather than a  
13 death sentence be imposed?" Okay. Sufficient mitigating  
14 circumstances. Mitigating circumstances, to mitigate, to  
15 lessen. Circumstances can be anything. Maybe -- maybe the  
16 defendant -- now, you already found him guilty of capital  
17 murder at this point and he's gonna get life or death, okay, so  
18 he's getting punished.

19 A. Uh-huh.

20 Q. The question though is, is there -- is there enough  
21 in his background to consider giving him life rather than  
22 death? That's this question essentially. And what the first  
23 part is to look at everything that's presented to you. You're  
24 probably gonna hear more about him on the second half should we  
25 get there, than you did on the first half?

334

336

1 A. Uh-huh.

2 Q. Okay? And a mitigating circumstance is something  
3 that lessens maybe his culpability in some ways maybe, or  
4 because he -- maybe he was a war hero. Maybe he was in Desert  
5 Storm and he saved a company of soldiers and you think, wow,  
6 you know, I think that's a mitigating circumstance, all right?  
7 Maybe he was an Eagle Scout. Only you, as the juror, can  
8 decide what a mitigating circumstance is, okay? These lawyers,  
9 I suspect, will suggest to you what a mitigating circumstance  
10 is not. Only the jury can decide. But the question is, is  
11 there enough mitigation to lessen the punishment and that's --  
12 you have to answer that yes or no?

13 A. That's a yes.

14 Q. Okay.

15 A. Definitely, yes.

16 Q. Okay. So that can be yes or no. So can you do these  
17 questions?

18 A. Yes.

19 Q. All right. Because at the beginning of the trial I  
20 always ask the jury to take an oath and everyone raises their  
21 right hand and I ask, "Do you solemnly swear that you will  
22 render a true verdict based upon the law and the evidence  
23 presented to you?" And they say yes. But some people tell me  
24 they can't take that oath in this case. Why? Because they  
25 can't participate in a process that may lead to the death

1 penalty, or they feel like if they convict him, that this is  
2 nonsense and they're not gonna follow the law, and to them,  
3 it's a knee jerk reaction, death penalty every time. And I'm  
4 not criticizing those people. They're fine to feel the way  
5 they do. It's just that they're not -- we don't want people  
6 who aren't gonna follow the law, okay?

7 A. Uh-huh.

8 Q. And I need to know from you, can you take that oath  
9 and follow this law, or are you one of like those two people  
10 that --

11 A. I could take that oath and follow the law.

12 THE COURT: All right. Mr. Skurka.

13 MR. SKURKA: Thank you, Judge.

14 VOIR DIRE EXAMINATION

15 BY MR. SKURKA:

16 Q. Good afternoon, Mr. Martinez. My name is Mark Skurka  
17 and this is Geordie Schimmel and we'll be presenting the case  
18 to you if you're selected on this jury on behalf of the DA's  
19 office. I want to start off by telling you there are no right  
20 or wrong answers to anything you say. We just want to know how  
21 you feel about some of the issues and the laws in this case.  
22 Please, please, don't answer the questions and say, "Oh, I  
23 think the judge probably wants me to say it this way so I  
24 better say it this way," or, "The defense wants me to say it  
25 this way." Do you see what I'm saying? Sometimes people couch

their answers thinking, I better say it this way or else I'll  
get in trouble. I can guarantee you, this judge is not gonna  
get you in trouble with anything like that. We just want to  
hear how you feel. Is that okay?

5 A. Okay.

6 Q. Okay. Let's start off with some simple stuff.

7 That's not that simple because it's a big issue in this case  
8 and it's the death penalty. You know that this is a pretty  
9 serious case and because the death penalty may be involved.  
10 Just because he's charged with it doesn't mean he automatically  
11 gets it, but, you know, that's a question we have to think  
12 about in death penalty, so I just kind of want to see how you  
13 feel about it. Can you tell me, in general, how you feel about  
14 the death penalty?

15 A. It's warranted -- if it's warranted, then I mean, go  
16 for it. But, of course, the mitigating circumstances thing,  
17 that kind of -- I don't know. You have to look at everything  
18 before you can just rush into making a decision about anything.  
19 And as far as one way or the other, I mean, am I for it, like  
20 die hard for death penalty? Well, no. I mean, who would be?  
21 Who is? Can I say, look, I'm gonna have to put you to death?  
22 Yes, if it's warranted.

23 Q. That's a pretty safe, fair answer because a couple of  
24 things I picked out in it, is number one, if it's warranted,  
25 you can give the death penalty, which tells me if it's not

1 warranted, you should get a life sentence; is that right?

2 A. That's right.

3 Q. And when you say, "if it's warranted," I'm assuming  
4 you're meaning based on the evidence and the facts?

5 A. Exactly.

6 Q. Not based on sympathy, or what a person looks like,  
7 or something like that. It's just like, hey, if the evidence  
8 is there, yes. If the evidence is not there, then no. I'm not  
9 trying to put words in your mouth, but that's kind of how you  
10 feel, right?

11 A. Yes.

12 Q. I mean, it's pretty straightforward on that thing  
13 because -- and that's what the law says. The judge spent a  
14 long time talking to you about you can't rush into things. You  
15 have to answer these questions. You have to consider  
16 everything. And what you said is right. No one's happy about  
17 having to sit on a jury like this. No one should be, you know,  
18 thrilled that they get the chance to put somebody to death, but  
19 on the other hand, you know, we're a nation of laws and the law  
20 in Texas is if you do this type of crime and the evidence is  
21 such you should get the death penalty, you should get -- you  
22 get the death penalty. But the law also says is if the  
23 evidence is not there, if it's -- if it's not enough evidence,  
24 and you think you should give a life sentence, you have to vote  
25 for a life sentence. So you kind of feel that way it's kind of

1 criminal case, and then you heard it could be a death penalty  
2 case. What was your first reaction when you heard that you  
3 were called for that kind of case?

4 A. I was curious, of course. That was my first  
5 reaction, curious. I wanted to know a little bit more about  
6 it. I've never been on a jury before. I've never been in a  
7 courtroom before, you know. I'm curious as to see. And I  
8 guess, not to sound cheesy or anything, but I want to do my  
9 civic duty. I mean, this is something that I want to do.

10 Q. There's nothing cheesy about being an American, and  
11 you know, you're right. People think it's corny, you know, but  
12 I don't think it's corny doing your civic duty. And you know  
13 why? Because that's what America is based on. We have juries  
14 make that decision. We don't have like a dictator or some  
15 president of the country, you know, saying, he dies, he doesn't  
16 die, he does this. You know, we don't want to have that. This  
17 judge is a powerful judge because he's a district judge. But  
18 guess what? He doesn't have the power to sentence somebody to  
19 death.

20 My boss Carlos Valdez, the DA, he can't just  
21 come up and say, "I sentence you to death." Our law puts that  
22 power in the hands of the 12 jurors. And I think it's -- I  
23 think it's a good law because you want to protect people from  
24 the government, and what better person to put that power in  
25 with the people themselves. So, you know, it -- it's maybe

1 your civic duty. I'm not real happy about doing it but I  
2 understand that, you know, somebody has to do that, and if I  
3 have to do it, I have to do it. Is that kind of how you feel?

4 A. Yeah, I said it in ten words, you said it in 150.

5 Q. That's because lawyers say it differently than  
6 laypersons.

7 A. No, I get you.

8 Q. Well, here's an easy way to say it. Some people talk  
9 the talk, but can you walk the walk?

10 A. Yes.

11 Q. In other words, I've had people come up there, Mr.  
12 Martinez, and say, "Hey, I believe in the death penalty, it's a  
13 good law. I think we should have the death penalty. I support  
14 the death penalty. But, stop, don't make me do it, don't make  
15 me carry it out." And that's what I'm looking from our point  
16 of view. Do I have a person in Antonio Martinez that cannot  
17 just talk about it but follow through with it if it's  
18 warranted?

19 A. Responsibly, yes.

20 Q. And responsibly meaning, I'm thinking again you're  
21 going back to if the evidence is there --

22 A. Yes.

23 Q. --and if the facts are there? Okay. When you first  
24 heard it was that kind of case -- remember that day there was  
25 about two or 300 people in there and you heard it was a

1 not the greatest system in the world. I mean, it's not  
2 perfect, but it's still pretty much better than anything else  
3 out there that I know about. And so don't apologize. It's  
4 not cheesy for doing your civic duty. I mean, that's what we  
5 need people to come out and do that.

6 But, you know, that first day, I'll tell you I  
7 saw some people out there in the audience. And when the judge  
8 said, "Look, folks, you may have to make a decision on a  
9 capital murder case," and you may have seen them. They were  
10 going like, "Oh, my gosh, I can't do that." They were kind of  
11 freaking out. They were thinking they're coming in for a  
12 shoplifting case, or you know, a burglary case, or stealing a  
13 car, and then they found out, man, I might have to decide if  
14 that guy lives or dies. And if they feel that way that's  
15 okay. I just -- you know, I just need to know.

16 But obviously, it sounds like you were curious  
17 and realized, hey, this is pretty important, I better listen  
18 to it and get a grasp on the law that the judge explains. Is  
19 that kind of how you felt?

20 A. Yeah. It's again, 200 words versus, yep.

21 Q. Okay. I'll try to slow down on my words. Let's just  
22 go back to some basics. The law says that you have murder plus  
23 something to make it capital murder. Murder in this case  
24 robbery. And it says, robbery – attempting or -- I'm sorry,  
25 committing robbery or in the course of committing robbery or

1 attempting to commit robbery. In other words, you don't have  
 2 to have a completed robbery, you don't have to have a  
 3 successful robbery. It's just if you try to rob somebody and  
 4 you kill someone during the course of that robbery. Say a  
 5 person goes into a bank and holds a gun on the teller and says,  
 6 "Give me all your money." And the teller's just about to give  
 7 them all the money when the cops break in and stop him from  
 8 robbing her. Can the guy go to court and say, "I'm not guilty  
 9 of robbery, I never got the money"? No. The law says, if  
 10 you're trying to commit robbery or attempting to commit  
 11 robbery, that's still a robbery. Follow me on that?

12 A. Yes.

13 Q. Okay. The law also says that there's two parts to  
 14 the trial. The first part is the guilt or innocence part, the  
 15 second part is the punishment part. And in most criminal cases  
 16 you only hear -- I mean, you only get to pick a number of years  
 17 for the punishment. Like, you know, stealing a car may be two  
 18 years up to ten years in prison. And, you know, you have a  
 19 range. You pick a number like two, five, eight or ten. Here  
 20 it's a little different because the first part of the trial you  
 21 decide whether he's guilty or not. Was he guilty of the crime  
 22 that day? And then the second part of the crime is what  
 23 punishment he has. And I think the judge already told you that  
 24 it's not automatic by any chance.

25 Sometimes people say, "He's guilty of capital

1 somebody, you know, breaking into their house, whatever,  
 2 that's a violent act.

3 And the third part says, "constitute a  
 4 continuing threat to society." And you've probably heard that  
 5 phrase. What does that mean to you?

6 A. Continuing threat?

7 Q. To society?

8 A. To society at large.

9 Q. Right.

10 A. I mean, what does it mean to me? Okay. Being a  
 11 continuing threat, that means you've been a threat in the past.

12 Q. Uh-huh.

13 A. You're still a threat right now so your track

14 record's already in the toilet.

15 Q. You're right. We don't have a crystal ball but would  
 16 you agree with me sometimes you can tell what a person's gonna

17 do in the future by what they've done in the past?

18 A. You can use history to predict, yeah.

19 Q. Yeah. And what you said right was the best track  
 20 record, you know. Is that for sure it's gonna happen? No.  
 21 But it's a pretty good predictor and stuff. The question -- go  
 22 ahead --

23 A. Yeah, it's a pretty good predictor, but can't people  
 24 change?

25 Q. Sure they can. Sure they can. And that's why I'm

1 murder and he automatically gets the death penalty." You have  
 2 to say no. You have to look at everything and answer these  
 3 two questions.

4 A couple of words I want you to pick out in  
 5 the questions if you read Special Issue No. 1 with me behind  
 6 you it says, "Is there a probability that the defendant would  
 7 commit criminal acts of violence that would constitute a  
 8 continuing threat to society?" In other words, does this guy  
 9 have a chance to be a danger in the future? I mean, could he  
 10 hurt somebody down the line? And the key words I want you to  
 11 look at is "is there a probability." It doesn't say for sure  
 12 he's gonna do it, certainty?

13 A. I'm not psychic.

14 Q. There you go. I was gonna say, you don't have a  
 15 crystal ball up there that you can look into. The law doesn't  
 16 require the State to prove for sure he's gonna do that. It  
 17 just says it's probable.

18 The next part says, "would commit criminal  
 19 acts of violence." Sometimes people say, "Well, I thought I  
 20 couldn't vote for death penalty unless I thought he was  
 21 actually gonna murder somebody again or he's capable of, you  
 22 know, killing somebody and committing capital murder again."  
 23 And I say, "The law doesn't say you think he's gonna murder  
 24 again. It says if you think he's gonna commit criminal acts  
 25 of violence." And that could be anything, assaulting

1 saying, the law doesn't say for sure. It says probability, you  
 2 know. Certainly, people can commit change and rehabilitate  
 3 themselves. I'm just saying that's a pretty good indicator,  
 4 though, right, what they've done in the past?

5 A. I agree with that.

6 Q. I was gonna say something about the Dallas Cowboys  
 7 but I don't even want to go there with their predictions and  
 8 stuff this year. I know it's been up in the air.

9 A. I was a mathlete, not an athlete.

10 Q. Oh. Well, look at that last word society. Sometimes  
 11 people say, "Well, Skurka, why don't we just instead of giving  
 12 him the death penalty, lock him up in prison? If you lock him  
 13 in prison they're taken away from society and they can't hurt  
 14 anybody so why can't that solve all the problems?" And I say,  
 15 "Wait a minute. Who else is in a prison besides that  
 16 prisoner?"

17 A. Correctional officers, I mean, warden, people that  
 18 actually just work there.

19 Q. That's exactly right. In other words, even if you're  
 20 locked up in prison, you're still capable or could be capable  
 21 of hurting somebody, right?

22 A. Uh-huh.

23 Q. Have you heard of that happening before?

24 A. Yes.

25 Q. Sure. I mean, it's not the thing. Some people think

1 like you lock them up in prison it's like throwing them on a  
 2 desert island, they'll never see anybody again, never hurt  
 3 anybody. But I always have to tell them, society -- prison is  
 4 still part of society. You got some of your rights taken away  
 5 but you're still intermixing with other human beings, right?

6 A. Uh-huh.

7 Q. So would you agree with me that prison would be part  
 8 of society and just because you're locked up doesn't mean you  
 9 can't hurt anybody, right?

10 A. I agree with that.

11 Q. Okay. So that's the first question. Is there a  
 12 chance he's gonna hurt somebody in the future and be a  
 13 continuing threat to society? And you answer that question yes  
 14 or no.

15 The second question is the mitigating  
 16 circumstances question and you answer that question yes or no.  
 17 But you look at what the big word the judge said was  
 18 mitigating circumstances. Mitigating. That word mitigating  
 19 means anything that would lessen or make less severe the  
 20 punishment. In other words, he did the crime, but is there  
 21 any reason to give him a break and give him a lower sentence?  
 22 So the judge says -- it's kind of like checks and balances.  
 23 You think he's guilty of capital murder, you think he's a  
 24 continuing threat to society. It looks like he's heading  
 25 toward the death penalty, but the judge says, "Stop, take into

1 mitigating circumstance, a possible one, that you  
 2 automatically lower it? No. It's kind of a balancing test.  
 3 You've kind of got to decide is there anything that balances  
 4 out that outweighs, you know, what he did the crime itself?  
 5 Maybe it was a really heinous crime. Maybe it was his  
 6 background is real bad, but maybe he's got a few, you know,  
 7 redeeming qualities, you know.

8 The question is you just -- I guess the point  
 9 is, you just can't ignore those other things. You have to  
 10 take the good with the bad and then make a balancing test.  
 11 It's kind of a fair way to look at it, don't you think?

12 A. I agree.

13 Q. The other part of the law that the judge may tell you  
 14 is called voluntary intoxication is not a defense to crime.  
 15 Voluntary intoxication. If you go get yourself drunk or high  
 16 on drugs and you go commit a crime, is that a defense to crime?

17 A. No.

18 Q. Absolutely not. The judge says, no, that's not a  
 19 defense to crime. You can't rob a bank and say, "Oh, sorry, I  
 20 was drunk so you can't find me guilty of robbing that bank."  
 21 No. The law does say it's a possible mitigating circumstance,  
 22 but again, the jury gives what effect it has. Some people may  
 23 say, "Well, he did rob that bank, but he was drunk so we're  
 24 gonna cut him a break." Other people may say, "I don't care if  
 25 he was drunk or not, you know, he did the crime he's got to pay

1 consideration all of the evidence, including the circumstances  
 2 of the offense," -- you know, what happened that day, the  
 3 surrounding circumstances, his character and background. Like  
 4 what good background, bad background. His personal moral  
 5 culpability. Is there enough? Is it sufficient mitigating  
 6 circumstance or circumstances to warrant that a sentence of  
 7 life rather than a death sentence be imposed? In other words,  
 8 he did the crime, but is there any kind of thing in his  
 9 background or the circumstances of the offense that would  
 10 warrant you cut him a break and give him a lower sentence?

11 What is a mitigating circumstances? It's up  
 12 to these folks on the jury. The judge is not gonna tell you,  
 13 well, if you hear this you have to lower the sentence. If you  
 14 hear this you have to lower the sentence. It's up to the  
 15 jury's mind. I think the judge gave you several examples  
 16 about, you know, maybe he was a war hero or had good grades in  
 17 school or something like that. Some people may say, "Well,  
 18 you know, he robbed that bank, and -- but, you know, he was an  
 19 honor roll student or he was a war hero." Other people may  
 20 say, "We should lower the sentence." Other people may say, "I  
 21 don't care if he's a war hero or made the honor roll. He  
 22 still robbed the bank, he's got to pay for that." And that's  
 23 what that question is kind of designed to say. Is there  
 24 anything to make you give him a lesser sentence of life  
 25 instead of death? Does it mean that because you hear a

1 for it." You see what I'm saying? I can't tell you what a  
 2 mitigating circumstances is. All I'm gonna say is the judge is  
 3 gonna tell you keep an open mind and listen to everything,  
 4 otherwise, you know, it goes back to that automatically finding  
 5 the death penalty. You don't do that automatically. You wait  
 6 till you hear everything. And it sounds to me that you're  
 7 gonna wait to hear everything?

8 A. Yeah, I'm not gonna give a biased opinion.

9 Q. Of course not. A couple of the other legal questions  
 10 I want to talk to you about is things like the indictment.  
 11 Remember he's charged with a crime right now. He's been  
 12 indicted by the grand jury, but that doesn't mean he's guilty  
 13 of the crime, correct?

14 A. That is correct.

15 Q. The State has to prove the case beyond a reasonable  
 16 doubt and beyond a reasonable doubt basically means -- it  
 17 doesn't mean beyond all doubt, or shadow of a doubt, or any of  
 18 that. You always hear it on TV. You've got to find him guilty  
 19 beyond a reasonable doubt. The law doesn't -- I'm sorry beyond  
 20 a shadow of a doubt. The law says beyond a reasonable doubt.  
 21 In other words, is there a doubt? If you don't have a doubt  
 22 you just go ahead and vote guilty. But then, if you do have a  
 23 doubt, ask yourself, is there a reason for my doubt? I mean,  
 24 is it just a feeling or a suspicion, or is there a reason for  
 25 it? Here's an example.

1 Say a person robs a bank, and the first witness  
 2 in the trial is the bank teller, and he -- the bank teller gets  
 3 up there and says, "There's the guy that robbed me, I recognize  
 4 his face. He had a gun in his hand and robbed me of the money.  
 5 And as he was leaving the bank I realized he was wearing a  
 6 yellow shirt." The next person comes in and is another teller  
 7 who was a couple of windows down and says, "There's the guy  
 8 that robbed us that day. I saw him rob the other teller.  
 9 That's the man. I recognize his face and he had a gun and a  
 10 bag of money when he left the teller's case, and he was wearing  
 11 a yellow shirt." The next witness is a bank guard who  
 12 encountered the guy out there on the sidewalk right outside the  
 13 door and actually captured him and said, "That's the guy that I  
 14 captured out there. I recognize his face. He had a bag of  
 15 money in one hand and gun in the other and he was wearing an  
 16 orange shirt that day." You've got a little bit of a  
 17 discrepancy. Two people said yellow shirt, one person says  
 18 orange shirt. But is that a reasonable doubt to think that he  
 19 didn't commit the crime? Well, you got three people that said  
 20 that's him, I recognize his face. You see what I'm saying?

21 A. Uh-huh.

22 Q. There's almost no way I can prove it to you 100  
 23 percent. The question is, is there a reasonable doubt to it.  
 24 You may have a doubt on what color shirt he had, right? But  
 25 does that amount to something as a reasonable doubt? That's

1 VOIR DIRE EXAMINATION

2 BY MR. JONES:

3 Q. The State of Texas has the death penalty as a form of  
 4 punishment. It's authorized in only a certain number of cases  
 5 that are all homicides and they all have an aggravating  
 6 circumstance attached to them. Do you generally believe that  
 7 we should have the death penalty as an option for those kind of  
 8 cases?

9 A. Yes.

10 Q. Do you believe that the State of Texas benefits from  
 11 having the death penalty?

12 A. Say that again.

13 Q. Does the State of Texas benefit from having the death  
 14 penalty as an option?

15 A. Do we benefit?

16 Q. Yes.

17 A. Maybe in some respects, maybe as a deterrent.

18 Q. Okay. A deterrent. That's certainly a reason for  
 19 having a certain kind of sanction. Any other benefit?

20 A. No.

21 Q. Do you personally believe that it is a deterrent?

22 A. If I commit a crime and my life is on the line, yes,  
 23 I would think twice about committing a crime.

24 Q. Okay. Have you read the stories recently, most of  
 25 them coming out of Dallas County, about the people being

350

352

1 kind of a corny example, but you see -- I guess what I'm trying  
 2 to say is like the judge is gonna tell you, you don't have to  
 3 prove it beyond all doubt, any doubt, shadow of a doubt.

4 The last thing I want to talk to you about is  
 5 the presumption of innocence. That basically means that at  
 6 this point he is presumed innocent, nothing's been proven  
 7 against him, and you have to consider him not guilty until the  
 8 State proves the case. Just because he's presumed innocent,  
 9 does that mean he's innocent? No. It just means right now  
 10 he's presumed innocent because the State hadn't put on any  
 11 evidence on the case. That presumption may change later on  
 12 once the State puts on the case. But you have to start him off  
 13 with innocent and the State has to prove him guilty. That's  
 14 just the law. It's as simple as that.

15 A. Yes.

16 Q. Makes sense?

17 A. Yes.

18 Q. Okay. I don't think I had any other questions of  
 19 you. Did you have any other questions about anything we talked  
 20 about?

21 A. Not as of yet.

22 MR. SKURKA: Okay. Then I'll let the defense  
 23 talk to you now and I appreciate you visiting with me.

1 convicted of various crimes and they're now being found to be  
 2 factually innocent?

3 A. No, I can't say that I have, no.

4 Q. The stories are appearing in newspapers. I think  
 5 I've seen three or four in the last five months and *Texas*  
 6 *Monthly* has a lead article on this. And basically, through the  
 7 procedural vehicle of habeas corpus, the Dallas District  
 8 Attorney's Office is finding out that just large numbers of  
 9 people that they convicted, you know, ten, 20 years ago are  
 10 really not guilty here. They're factually innocent.

11 When you hear about that, or I mean, you just  
 12 now, I guess, heard about it for the first time, how does it  
 13 make you feel?

14 A. Well, I just heard about it in Dallas for the first  
 15 time, but of course, you hear cases like that, well, not all  
 16 the time, but you hear them. Personally, I get angry.

17 Q. Okay. So you -- so it doesn't please you that an  
 18 innocent person might get convicted and go to prison?

19 A. How would that please me? Why would that please me?

20 Q. It shouldn't.

21 A. No, not at all. No. If somebody's innocent then  
 22 they shouldn't be punished. If they didn't do it, they  
 23 shouldn't be punished.

24 Q. Do those cases -- don't those cases prove that we can  
 25 make mistakes in this business?

1 A. Yes, of course.

2 Q. It's a human institution and humans are not perfect.  
3 In the criminal law, we have an elaborate appeal process --  
4 A. Yes.

5 Q. -- the purpose of which is to correct mistakes. And  
6 in the case of these fellas up in Dallas, the good news for  
7 them was at the time the mistake was finally discovered and  
8 corrected, they were still alive.

9 A. Yes.

10 Q. Now, you can see in a death penalty case, after the  
11 appeal process runs and the person's executed, if they discover  
12 there was a mistake later, you can't go back and correct it,  
13 right?

14 A. No. It would be my fault because I was on that jury.

15 Q. Now, knowing that the system is not perfect and that  
16 innocent people are convicted from time to time -- it doesn't  
17 happen very often, but it does happen -- do you think the  
18 benefits of having the death penalty are worth the risk of  
19 convicting an innocent person of capital murder or executing an  
20 innocent person from time to time?

21 A. So you're saying -- okay. Is the percentage all  
22 right, is that what you're saying? Okay. Let's say half of 1  
23 percent --

24 Q. Maybe it's if 1 in 500 executions where the person  
25 would be actually -- it's not very many but it's 1.

1 A. Oh, and that one doesn't matter?

2 Q. No. I'm saying does that matter --

3 A. That one does matter.

4 Q. Okay. Well, is -- but are there benefits --

5 A. I value life.

6 Q. Okay.

7 A. I do value life, so I don't have a problem with  
8 imposing the death penalty.

9 Q. Okay.

10 A. Even though I value life, okay?

11 Q. But you understand --

12 A. Now, you're trying to make me -- well, not to make  
13 me. You're telling me to put, I guess, credence in. Okay.  
14 One out of 500. Is that okay?

15 Q. I just picked that, which is not very many.

16 A. Well, one out of two, one out of 10,000 it still  
17 doesn't matter. There's still that one.

18 Q. Well --

19 A. In a long roundabout way, is it beneficial, you know,  
20 for us to still continue to have the death penalty when we  
21 still kill that one?

22 Q. Yes.

23 A. Yeah. Is it still beneficial?

24 Q. That's kind of almost a philosophical question, isn't  
25 it?

1 A. A bit.

2 Q. So, is it or isn't it, in your mind?

3 A. We should keep the death penalty.

4 Q. Okay. So it's worth the cost, however small it might  
5 be?

6 A. Well --

7 Q. However small it might be?

8 A. You're trying to diminish -- you're trying to  
9 diminish that. You just said it right there. It's worth the  
10 cost however small that might be. Okay. What if it was  
11 you put --

12 Q. It would be --

13 A. -- as an innocent man? What if it was you put in --

14 Q. It would be 100 percent I.

15 A. Uh-huh, yeah.

16 Q. Or if it was your son or somebody from your family?

17 A. Yeah, exactly, exactly.

18 Q. Okay. But in spite of the fact that that could  
19 happen, you're not willing -- you're still willing to keep the  
20 death penalty on the books?

21 A. Yes.

22 Q. Okay. All right. Let's talk about how the death  
23 penalty is reached in the State of Texas.

24 A. Okay.

25 Q. There are three conditions that have to be met. What

1 is the first one?

2 A. Say that again.

3 Q. Three conditions have to be met before the death  
4 penalty can be imposed in Texas. The first condition is the  
5 defendant has to be found guilty of capital murder.

6 A. Yes.

7 Q. Okay. That's -- that almost goes without saying. If  
8 a person is found guilty of capital murder, the trial goes into  
9 a second phase which deals with the punishment. Different  
10 rules of evidence apply. The jury can expect to hear  
11 additional evidence that may have not been admissible at the  
12 first part of the trial.

13 A. Really?

14 Q. Yes. And also the evidence that you hear would be  
15 relevant to the two questions that you see on either side of  
16 you.

17 A. Okay.

18 Q. And it would be the answer of those two questions to  
19 determine whether the death penalty would be imposed or not.  
20 Let's take Special Issue No. 1, that's off to your left hand.

21 A. Uh-huh.

22 Q. In order for the jury to return a verdict of yes,  
23 that is, answer that question yes, all 12 jurors must believe  
24 the answer should be yes beyond a reasonable doubt.

25 A. Uh-huh.

1 Q. However -- the rules about -- the rules about  
 2 unanimous verdicts is a little bit changed. The judge will  
 3 instruct you that if ten of the jurors believe the answer  
 4 should be no, which would be a favorable vote to the defendant,  
 5 right?

6 A. Yes, correct.

7 Q. Then the verdict can be returned as no. In other  
 8 words, it doesn't take a unanimous vote. Ten to two will  
 9 produce a no answer.

10 A. Okay.

11 Q. If the -- if the question is answered no, you will be  
 12 instructed to stop your deliberations and return a verdict to  
 13 the Court. And when that happens, what punishment's gonna be  
 14 imposed?

15 A. That would be life.

16 Q. That's right because that condition has not been met.

17 A. That's correct.

18 Q. There's no need to go any further, right?

19 A. No.

20 Q. But if the jury answers the question yes, then it's  
 21 instructed to go to the second question --

22 A. Yes.

23 Q. -- which is to your right hand. Would you read that  
 24 question to yourself and tell me when you're finished?

25 A. Done.

1 ask you to consider are the facts and circumstances of the  
 2 offense. But you've already heard that in the first part of  
 3 the trial, right?

4 A. Yes.

5 Q. But you can think about the manner in which the  
 6 offense was committed and so forth, okay?

7 Then it says to consider the defendant's  
 8 character and background. And what does it mean -- if I say  
 9 that you're a person of good character, what do I mean?

10 A. Well, to me, that's going to be a lot different than  
 11 to somebody else.

12 Q. No. But if I say -- if I say somebody's a person of  
 13 good character, what am I saying about that person?

14 A. To me it would be something like a loyal, a loyal  
 15 friend. That's a person of good character to me.

16 Q. Okay. So loyalty is a moral value, right?

17 A. Uh-huh.

18 Q. Loyalty is good, being trustworthy is good. Honesty  
 19 is good, right?

20 A. Helpful, friendly, courteous, kind, obedient.

21 Q. The Boy Scout Law, Ten Commandments and so forth.  
 22 Those are the rules that make up the moral code of our society?

23 A. Uh-huh.

24 Q. And the degree to which the person adheres to that  
 25 code and follows it is the way we judge his character.

1 Q. Are there any words or phrases in that question that  
 2 you do not understand?

3 A. No.

4 Q. The question is asking -- well, first of all, the  
 5 main thing it's asking is are there any mitigating  
 6 circumstances that would cause you to want to vote for a life  
 7 sentence?

8 A. I understand that.

9 Q. But before -- but before it gets down to the  
 10 question, it asks you or directs the jury to consider certain  
 11 things. What does the verb "to consider" mean?

12 A. To take and listen and absorb and then decide.

13 Q. You got it. In other words, to consider means to  
 14 think about something, information with the view toward doing  
 15 something with it.

16 A. I didn't catch your name, by the way.

17 Q. Jones.

18 A. Jones. Sorry.

19 Q. Just plain Jones.

20 A. Sorry.

21 Q. That's all right. Now, to consider something means  
 22 to think about information, usually with a view toward doing  
 23 something with it.

24 A. Uh-huh.

25 Q. And so in this case, if they -- the first thing they

1 Now, what about background, what does that  
 2 mean? That's pretty easy.

3 A. Pretty easy. How somebody grew up, where they come  
 4 from, what they've done.

5 Q. His biography, his history. Now, the fact that that  
 6 question mentions background is not an accident. The Supreme  
 7 Court of the United States has said that the defense attorneys,  
 8 in order -- if they're gonna do their job have to investigate  
 9 and prove up a defendant's background in a capital murder case,  
 10 good or bad, okay?

11 A. Uh-huh, that's right.

12 Q. So let's say, for example, not maybe this case, but  
 13 just in capital murder cases generally, you're on the jury and  
 14 you hear evidence of the defendant's background, how he grew up  
 15 and when -- he was born into a single parent family, mother was  
 16 poor and uneducated. He wasn't required to go to school, he  
 17 was abused by his mother's boyfriends, etc., etc. In other  
 18 words, the kid had a really bad upbringing, okay? If you came  
 19 across evidence like that in a capital murder case, could you  
 20 consider it with a view towards it causing you to want to vote  
 21 for a lesser punishment?

22 A. I would consider everything, including the  
 23 background, of course.

24 Q. Okay.

25 A. I mean, you have to know where you've been to see

1 where you're going.

2 Q. Okay. Let's say you're on the jury and you hear --  
 3 you hear evidence of bad background, poor defendant just really  
 4 had every disadvantage that you've heard about. And you say,  
 5 "Well, you know, I'm really concerned about that and I think in  
 6 this particular case that because of his bad background, I'm  
 7 gonna vote for a life sentence." And the juror next to you  
 8 says, "Hey, wait just a minute, you know, there are lots of  
 9 people that have bad backgrounds. There are lots of people  
 10 that get born into, you know, every disadvantage when they're  
 11 growing up and they don't go out and commit crimes. It's no  
 12 excuse, you know, that his mother beat him. That's no excuse  
 13 for committing a crime." So what's wrong with that argument?

14 A. Well, there's no excuse but --

15 Q. It's not -- excuse refers to that information as  
 16 being a defense. You've already decided the person is guilty.  
 17 This question asks you to do something more than merely  
 18 deciding his guilt. You've already decided it, okay? You got  
 19 the idea there that, first of all, you've got -- you've got to  
 20 tell us if we give you background information, that you will  
 21 think about it with a view toward using it to convince yourself  
 22 to vote for a life sentence.

23 A. Yes, I can.

24 Q. You don't have to tell us how you're gonna vote.

25 A. I can use information given, yeah, to --

1 Q. Okay. And you can imagine some situations where a  
 2 person can be born into this world and grow up and maybe not  
 3 know what the rules are or never get any reliable instruction  
 4 about what they are?

5 A. That can also happen, yes.

6 Q. Okay. Another aspect of moral culpability is after  
 7 you get passed the person knows the rules in life, then there's  
 8 a question about are there any circumstances in the case which  
 9 would affect his ability to make judgments about which course  
 10 of action to take, okay?

11 A. Uh-huh.

12 Q. Okay. So, in other words, you say, okay, he knows  
 13 what the rules are, but at the time that he engaged in the  
 14 conduct, was something affecting his judgment? Okay. For  
 15 example, let's take alcohol. I think the prosecutor said  
 16 voluntary intoxication is not a defense to crime. In other  
 17 words, you can't get drunk and commit a crime and say, "Oh, I  
 18 was drunk and therefore I'm not guilty." But it might be a  
 19 mitigating circumstance. So what does that mean?

20 A. You have to listen to all the factors before --

21 Q. Well, if it's saying that intoxication might be a  
 22 factor in determining whether -- in determining whether or how  
 23 a person was exercising his judgment.

24 A. Okay.

25 Q. Okay. So, of course, one side will argue that

1 Q. That you might vote one way or about it?

2 A. Of course. That's called -- that's part of being  
 3 open-minded.

4 Q. Right. Okay. We had a juror during this week who  
 5 said that she couldn't -- background didn't make any difference  
 6 to her, you know. She wouldn't consider it. Because in her  
 7 personal view that that was not relevant.

8 Okay. Then we drop down to the next item, the  
 9 personal moral culpability of the defendant. What does that  
 10 mean? Personal means the defendant. What does moral  
 11 culpability mean?

12 A. What is his moral code.

13 Q. Okay.

14 A. I don't know. I haven't been given that information  
 15 yet.

16 Q. Okay. Do you believe in the doctrine of free will?

17 A. Yes.

18 Q. In other words, that once a person reaches maturity  
 19 that we kind of assume that they've absorbed the moral code of  
 20 the society and they can make choices --

21 A. Yes.

22 Q. -- to follow or not to follow the rules, okay? So  
 23 one aspect of moral culpability is -- is a determination that a  
 24 defendant knows what the rules are?

25 A. Yes.

1 voluntary intoxication, you know, you need to be real careful  
 2 about how you answer that question. In other words, you can't  
 3 -- anyway, is there anything going on or maybe a person has a  
 4 low IQ, and maybe not very smart, okay? Or maybe a person  
 5 might have a mental illness that might affect how he exercises  
 6 his judgment, got some screw loose someplace, okay? So do you  
 7 feel like you understand what that means, moral culpability?

8 A. Yes, I do.

9 Q. Okay. Now culpability. Now, were you given the  
 10 illustration of the burglary where -- did they talk about it?  
 11 Okay. The one burglar goes in, you know, to enrich himself;  
 12 the other burglar goes in to steal food to feed his kids. And  
 13 you're the judge and you're hearing both cases and you're  
 14 assessing punishment. And I think you told us you wouldn't  
 15 give the same punishment in both cases?

16 A. At the -- yeah.

17 Q. Okay. Well, both of the defendants are guilty of  
 18 burglary, right?

19 A. Yes.

20 Q. Okay. And so if you're not gonna give the same  
 21 punishment to both of them, why would you give a lower  
 22 punishment to the one that was stealing for his kids?

23 A. I didn't say I was gonna give a lower punishment.

24 Q. Okay.

25 A. It's back to the two and 20. There's mitigating

1 circumstances, you know.

2 Q. So in the illustration the hypothet, the guy that  
3 broke into the house to enrich himself and vandalized the  
4 house, are you gonna -- say the maximum punishment is 20 years.  
5 Are you gonna give him 20 and give the other guy 20 also?

6 A. I don't know.

7 Q. You don't know. Okay. Why would you -- why would  
8 you give the person who was stealing to get food maybe a lesser  
9 punishment?

10 A. Well, is his crime warranted then? Is that what  
11 you're saying?

12 Q. No. If -- let's say you decided to give him a lesser  
13 punishment. What's your rational for doing so?

14 A. I don't know yet.

15 Q. You don't know yet. Okay. Isn't the person that's  
16 stealing to feed his children have a lower moral culpability  
17 than the person whose stealing to enrich himself?

18 A. I might agree with that.

19 Q. Do you -- tell me what the verb "to mitigate" means?

20 A. To mitigate. I guess I would say to really decide --  
21 no, no, no. To lessen.

22 Q. To lessen. That's right. That's what it means. Any  
23 fact -- any fact which is before you in the evidence which  
24 would cause you to want to vote for a life sentence or a death  
25 sentence or a life sentence. That would be a mitigating

1 THE COURT: All right. Mr. Martinez, you were  
2 not selected to be on this jury, but we do appreciate you  
3 coming down here and spending all this day with us.

4 VENIREPERSON NO. 49: All right.

5 THE COURT: Thank you very much.

6 VENIREPERSON NO. 49: Thank you, sir.

7 THE COURT: All right. Let's get the next  
8 juror in, Laura Hinojosa.

9 (Venireperson enters courtroom.)

10 THE COURT: All right. Ms. Hinojosa, sorry,  
11 we're running way behind.

12 VENIREPERSON NO. 82: I didn't eat lunch  
13 because I thought it was gonna be an hour at 1:30, but that's  
14 okay.

15 THE COURT: And here's the thing. I mean,  
16 it's like you've spent so much time down here, I don't want to  
17 make you come back on a different day.

18 VENIREPERSON NO. 82: I don't want to come  
19 back.

20 THE COURT: Yeah, that's what I figured.

21 VENIREPERSON NO. 82,  
22 LAURA LOPEZ HINOJOSA,  
23 VOIR DIRE EXAMINATION

24 BY THE COURT:

25 Q. This is a capital case and it's important and it's

1 factor. Sorry.

2 MR. JONES: Okay. That's all.

3 THE COURT: All right. Anything else?

4 MR. SKURKA: No, Judge, I don't have anymore  
5 questions.

6 THE COURT: All right. Why don't you wait in  
7 the jury room and we'll be right with you.

8 VENIREPERSON NO. 49: All right.

9 (Venireperson exits courtroom.)

10 THE COURT: Are they sitting in the dark?

11 THE BAILIFF: They want to sit in the dark.

12 THE COURT: Okay. All right. Mr. Skurka,  
13 what say you?

14 MR. SKURKA: Can you give us just a minute,  
15 Judge?

16 THE COURT: Yes.

17 (Counsel conferring.)

18 THE COURT: All right. Let's put it on the  
19 record. There's an agreement.

20 MR. GARZA: There's an agreement to allow this  
21 juror to be dismissed for cause, Your Honor.

22 THE COURT: Okay.

23 MR. SKURKA: I agree, Judge.

24 THE COURT: All right. Let's bring him in.

25 (Venireperson enters courtroom.)

1 taken longer than we anticipated today. And I'm sorry about  
2 that. We're gonna make a decision about whether you get on  
3 this jury today, okay, so you don't have to come back.

4 All right. We're looking for people that can  
5 keep an open mind and follow the law, okay? I see you've seen  
6 something in the news media about it. Can you still keep an  
7 open mind?

8 A. What I've -- I remember Times Market but I -- I don't  
9 know specifics.

10 Q. Just very little?

11 A. Yeah.

12 Q. Okay. That wouldn't preclude you then?

13 A. No. And I do know Sara from court reporting school  
14 so I don't know if that --

15 Q. That's okay too. I mean, I just need to know.

16 Because some people come in here and they say, "Well, you know,  
17 I saw something on TV," or maybe for some other reason, you  
18 know, they just think I can't be fair and I guess you're the  
19 only one that can tell us.

20 A. Well, you know, honestly, when I left after filling  
21 out the paper, I was very stressed and I did have -- I saw his  
22 face and I felt sadness, so, that might exclude me. I don't  
23 know.

24 Q. Well, let's -- let's cut to the chase then. This is  
25 -- this is a capital murder and what that means is -- and I --

1 I know we told you the other day, but, I mean, this is a death  
 2 penalty case, all right? That's a possibility, that's what  
 3 makes -- that's what capital. That means death penalty is a  
 4 possibility. And I guess some people say, Look, I agree with  
 5 the death penalty, but when push comes to shove, they just  
 6 don't think they can do it. And if that's you, that's okay.

7 A. Yeah.

8 Q. Okay? That's okay. It's all right. Maybe if that's  
 9 you and you don't think you can do this, maybe, you know, you  
 10 come back on another case, a kind of case of DWI or a burglary,  
 11 or maybe even just a murder that doesn't involve the death  
 12 penalty, that's okay. But we do need to know that.

13 A. I think that would be me. I don't think -- well, I  
 14 think if I did that, I think I would stress over it, you know.  
 15 I would definitely labor over that. I would be --

16 Q. Well, and of course, we want people -- I mean, this  
 17 is a serious decision. We want people that will really take a  
 18 look at the case, but if it's gonna -- if it's something that  
 19 you feel like for whatever reason, you can't do.

20 A. I feel like I would do what I had to do, but I think  
 21 I would definitely stress.

22 Q. Okay. Well, you tell us. I mean, if you can't do  
 23 this, that's okay, but you've got to tell us. Because what  
 24 you're telling me now is, yes, I can -- and it's hard because  
 25 you've probably never been put in this -- you've probably never

1 you being honest with us, but we do appreciate your time and  
 2 all the time you've spent down here. If you need a work  
 3 excuse, we can get you one.

4 VENIREPERSON NO. 82: I have one, thanks.

5 (Venireperson exits courtroom.)

6 THE COURT: All right. We got one left. Do  
 7 you want to take five?

8 MR. JONES: No.

9 THE COURT: All right. Let's roll. Go get  
 10 them. Let's go get her.

11 MR. SKURKA: What number are we on, 84?

12 MR. GARZA: 84.

13 VENIREPERSON NO. 84,

14 CHRISTINE FOUTCH,

15 VOIR DIRE EXAMINATION

16 BY THE COURT:

17 Q. All right. You are Christine Foutch; is that right?

18 A. Yes.

19 Q. I know you've been here a while. This is a death  
 20 penalty case. You can have a seat.

21 A. Thank you.

22 Q. And, so obviously, we're -- you know, it takes  
 23 careful attention, okay? We thought the day would go a little  
 24 faster than it did and it didn't. But the last thing I wanted

370

1 been picked on a capital murder jury before. And I had a juror  
 2 the other day, you know, it's like I'll tell -- I'll tell you  
 3 what I told him. I said, "You got to tell us what side of the  
 4 line you're on because it matters. It makes a difference  
 5 procedurally." Okay. So I need to know from you that this is  
 6 something that you can do, or if it's just so stressful for you  
 7 you're just not gonna be able to do this duty.

8 A. I think I'd be stressed and I probably wouldn't do a  
 9 good job.

10 MR. GARZA: Your Honor, can we address the  
 11 Court outside the presence of the jury.

12 THE COURT: Yes. Let me talk to these lawyers  
 13 and we'll get right with you.

14 (Venireperson exits courtroom.)

15 THE COURT: Okay.

16 MR. GARZA: I think we can probably agree to  
 17 dismiss this juror for cause.

18 THE COURT: I think if you seat her she's  
 19 gonna melt down eventually.

20 MR. SKURKA: The State will agree on No. 82.

21 THE COURT: All right. Let's bring her in  
 22 then.

23 (Venireperson enters courtroom.)

24 THE COURT: All right. Ms. Hinojosa, we're  
 25 gonna go ahead and agree to let you go. We really appreciate

372

1 to do was after you had been here all afternoon was bring you  
 2 back a second day, okay?

3 A. Sure.

4 Q. So I'm sorry about that. All right. You have -- you  
 5 filled out a questionnaire and we have that. Let's -- we need  
 6 to talk about a few things.

7 First of all, you haven't heard anything about  
 8 this case.

9 A. No, sir.

10 Q. You think you can keep an open mind?

11 A. Yes, sir.

12 Q. Okay. Some people can't. And that's okay too, but  
 13 it wouldn't be fair if we didn't have people that could.

14 A. Right.

15 Q. All right. That's issue one. Issue two is the law.

16 Let's talk about it. Let's see here. You have never been on a  
 17 jury before, and that's okay. That's okay. No prior service  
 18 necessary here.

19 Okay. Let's talk about some things. This is a  
 20 criminal case. That means the State has the burden of proof.

21 The law says, "State, you've brought the charges, then you got  
 22 to prove them." Okay? And the burden always stays on the  
 23 State and never shifts over here to the defense. Do you agree  
 24 with that?

25 A. Yes.

1 Q. Okay. Next thing, the burden of proof is beyond a  
 2 reasonable doubt. It's the highest burden that we have in the  
 3 law, okay? It's not beyond all doubt, but it is a high burden.  
 4 Could you hold the State to that burden?

5 A. Yes.

6 Q. All right. Since the State has the burden of proof,  
 7 the law says that the defendant in this case, and in any case,  
 8 is presumed to be innocent until and if the State can prove  
 9 otherwise, okay?

10 A. Yes.

11 Q. So that you have to presume the defendant innocent  
 12 till the State can prove otherwise. All right. You can do  
 13 that?

14 A. Yes.

15 Q. Okay. Because some people can't. Some people say,  
 16 well, he's charged therefore --

17 A. Oh, right.

18 Q. And there's places in the world like that. I don't  
 19 want to live in the places like that. I don't know about you.

20 A. No.

21 Q. Okay. So that's that. Other issue. And this one  
 22 gets a little bit more involved but it's part of the same  
 23 concept, and that is, the Constitution of the United States  
 24 says the defendant doesn't have to testify.

25 A. Right.

1 A. Okay.

2 Q. It's a bifurcated system. There's a guilt or  
 3 innocence phase, and then there's the punishment phase. Guilt  
 4 or innocence, what's that? That's just whether the State can  
 5 prove to the jury beyond a reasonable doubt that the  
 6 defendant's guilty of the crime.

7 A. Okay.

8 Q. And, you know, we'd have a trial about that, and the  
 9 jury can go back and deliberate. If the defendant is found not  
 10 guilty, then case is over with. If, however, the defendant's  
 11 found guilty, we go on to the second part of the trial. Two  
 12 things that can happen if a defendant's found guilty of capital  
 13 murder. There's only two possibilities, life in prison or the  
 14 death penalty. Okay. Both very serious punishments. Okay?

15 A. Okay.

16 Q. But the jury doesn't go back to deliberate and say,  
 17 "Hey, let's take a vote, what do we vote? Okay. Let's come up  
 18 with death or we come up with a vote, life." No, we don't do  
 19 that. They answer questions and here is one of them. "Is  
 20 there a probability that the defendant would commit criminal  
 21 acts of violence that would constitute a continuing threat to  
 22 society?" You know, is the defendant probably gonna do  
 23 criminal acts of violence against others in the future? That's  
 24 what that's all about, okay?

25 A. Okay.

374  
 1 Q. Okay. Some people would hold it against him if he  
 2 didn't testify. The law says, not only does he not have to  
 3 testify, State can call him as a witness, but the jury can't  
 4 hold it against him.

5 A. Right.

6 Q. Okay. And would you hold it against the defendant?

7 A. No.

8 Q. Okay. All right. This case is a capital murder.  
 9 What does that mean? Well, it's murder plus, essentially what  
 10 a capital murder is, okay? Murder plus something else. This  
 11 particular case the allegation is murder in the course of  
 12 committing a robbery or attempting to commit a robbery?

13 A. Okay.

14 Q. So the legislature says, well, if you've got -- if  
 15 you commit these two serious felonies together, then capital --  
 16 it's capital murder and they can prove all of it. And the  
 17 capital part, of course, meaning the death penalty is a  
 18 possibility, okay? And the law says that State has to prove  
 19 all of the elements of the crime, and there's quite a few of  
 20 them because there's two major felonies together, okay?

21 A. Okay.

22 Q. And you would hold the State to that burden?

23 A. Yes.

24 Q. Okay. Now, we have two parts of the trial in Texas,  
 25 okay?

1 Q. We can never be sure. But they're asking -- you  
 2 know, you can't read the future, okay?

3 A. Right.

4 Q. But what -- you know, what they're asking here is, is  
 5 it probably true that he will commit acts of violence and be a  
 6 continuing threat to society and the jury has to answer that  
 7 yes or no.

8 A. Okay.

9 Q. Okay?

10 A. Uh-huh.

11 Q. Then the jury will go to the second question. "After  
 12 taking in consideration all of the evidence, including the  
 13 circumstances of the offense" -- that's the first part of the  
 14 trial.

15 A. Okay.

16 Q. -- "the defendant's character and background." Well,  
 17 what's character? Well, that's what kind of guy he is. You  
 18 know, good guy, bad guy, moral guy, immoral guy, that kind of  
 19 thing. Background, what's that? Well, that's his childhood,  
 20 how he grew up, what is his family, you know, how did he grow  
 21 up, you know, in his family life, stuff like that, okay?

22 A. Uh-huh.

23 Q. -- "and the personal moral culpability of the  
 24 defendant." Well, that's kind of a mouthful, but that's  
 25 legalese sort of meaning his -- his culpability. I mean,

1 you've already found him guilty of the crime but it's sort of  
 2 like, well, how guilty is he. Let me give you an example. Two  
 3 guys get convicted of burglary. One guy, he's a career  
 4 burglar. He's been to prison twice before and he goes and he  
 5 breaks into a house and just trashes the place, just takes all  
 6 the people's jewelry and electronics and stuff like that.

7 A. Uh-huh.

8 Q. And he and his girlfriend go to Las Vegas and get  
 9 high on cocaine all weekend, okay? They finally catch him.  
 10 The other guy, he loses his job he's held for a long time, good  
 11 guy, but he runs out of money and he's got three kids that are  
 12 really hungry so he goes in the next door neighbor's house,  
 13 doesn't break in but he does go in, and he takes some food, and  
 14 all he does is take food to his kids. Never been in trouble in  
 15 his life, okay?

16 A. Okay.

17 Q. Can you see how the personal moral culpability of  
 18 those people would be different?

19 A. I do see a difference.

20 Q. Okay. And that's kind of what that's talking about.

21 A. Okay.

22 Q. All right? Then is – and then taking into  
 23 consideration all this stuff because at the second part of the  
 24 trial you may hear a bunch of other stuff. Okay. The first  
 25 part is just about what happened that day, see if they can

1 yes. But I need to know if you can do that. And before you  
 2 answer, some people say, "I cannot because I cannot participate  
 3 in a process that could lead to the death penalty." Others  
 4 say, "If I find him guilty, I'm not -- I'm not gonna listen to  
 5 your law. I'm gonna rig these questions so that I will -- he  
 6 will always get the death penalty. I will not follow this  
 7 process." Neither of those people can truthfully take the  
 8 oath, okay?

9 A. Okay.

10 Q. I need to know if you can.

11 A. Yes, sir.

12 THE COURT: Okay. All right. Mr. Skurka.

13 VOIR DIRE EXAMINATION

14 BY MR. SKURKA:

15 Q. Hi.

16 A. Hi.

17 Q. How are you tonight?

18 A. Fine. Thank you.

19 Q. I say tonight because it seems like it has been a  
 20 long day.

21 A. It has been.

22 Q. And it has for all of us. Would you pronounce your  
 23 last name for me, please?

24 A. Fouch.

25 Q. Just like it's spelled?

1 prove the case, okay?

2 A. Okay.

3 Q. Maybe they can, maybe they can't. But if you get in  
 4 here, you're considering everything that happened that day and  
 5 maybe some other stuff, background stuff, okay?

6 A. Okay.

7 Q. "Is there sufficient mitigating circumstances to  
 8 warrant life in prison sentence rather than a death sentence  
 9 being imposed?" So what they want you to do is take everything  
 10 into consideration. Is there enough mitigating circumstances,  
 11 lessening things that are in his favor, you know. Maybe he was  
 12 a war hero in Desert Storm, okay? Maybe he saved 20 soldiers.  
 13 Maybe he was a war hero, he's got a bronze star. Maybe he was  
 14 just -- you know, he worked in the community with kids, stuff  
 15 like that.

16 A. Okay.

17 Q. And then you determine whether there's -- you know,  
 18 you might find mitigating circumstances, but they may not be  
 19 sufficient to warrant a life sentence, or maybe they are.  
 20 That's what the jury has to answer here.

21 A. Okay.

22 Q. Yes or no. And I need to know -- because I always  
 23 give an oath at the beginning of the trial. And I tell the  
 24 jury, "Do you swear to render a true verdict based upon the law  
 25 and evidence presented to you?" And then the jury will say,

1 A. Yes, sir.

2 Q. Let me tell you that there's no right or wrong  
 3 answers to anything you say. We just want to ask some  
 4 questions, see how you feel about some of the law and the  
 5 issues you feel in this case.

6 As the judge introduced me, my name is Mark  
 7 Skurka, I'm an assistant district attorney. This is Geordie  
 8 Schimmel, and together we'll be presenting this case to you if  
 9 you're selected on this jury. I'm gonna go through some of  
 10 these examples of law pretty quick, but if I don't explain  
 11 myself very well, just stop me or something because we've been  
 12 talking all day to jurors and I'm a little --

13 A. Okay.

14 Q. -- a little fumbly right now. Let's get some simple  
 15 things. First of all, how do you feel about the death penalty  
 16 just in general terms?

17 A. I do support the death penalty.

18 Q. Why?

19 A. I do believe that it is a good deterrent. I believe  
 20 there are crimes that do constitute people giving up their  
 21 rights when they do things to others. I mean, I have children.  
 22 That's what I teach them to believe.

23 Q. Well, and that's certainly a good answer because what  
 24 you're telling me is -- at least the words I'm hearing is you  
 25 think it's good because it deters other people from committing

1    crimes, and it certainly deters the person who committed the  
 2    crime. And I like the way you said, "in certain crimes you  
 3    need to have it." Which, I don't want to put words your mouth,  
 4    but does that kind of mean like, well, I understand we have the  
 5    death penalty for just a few crimes. Not every crime is going  
 6    to be eligible for the death penalty, only certain crimes. Is  
 7    that kind of how you feel?

8       A. That's true.

9       Q. And that's exactly what the law says. I think a lot  
 10   of people came in a few weeks ago on jury duty and they thought  
  11   every murder case is possible to face the death penalty and we  
  12   always have to tell them the difference between plain murder  
  13   and why this is capital murder because it's murder plus  
  14   something else. In this case, plus a robbery during the  
  15   commission of the offense. And a lot of other people say,  
  16   "Well, gosh, I thought everybody murder case gets the death  
  17   penalty." And I tell them, "No, the legislature makes it very  
  18   few cases to do it." And it's obvious, the worst kind of  
  19   cases, killing a kid under six, or killing an officer on duty,  
  20   or multiple murders, or killing somebody while you're robbing  
  21   them or raping them or kidnapping them or burglarizing them.  
  22   It's only those certain cases. So it seems to me that you  
  23   believe that there's a place and a time for the death penalty,  
  24   only in those kind of crimes that qualify for it, first; and  
  25   second, if the evidence is there to determine that it is?

1       A. Yes, definitely.

2       Q. I don't want to put words in your mouth.

3       A. No. You said it very well. Thank you.

4       Q. Well, we've been talking to a lot of people so I'd  
 5   just like to hear if that's what they're thinking. And it also  
 6   tells me that it sounds like you're gonna be pretty careful and  
 7   that you're not saying for sure every case --

8       A. No, sir.

9       Q. – that a murder case is gonna get capital murder,  
 10   are you?

11      A. No, sir.

12      Q. And just the fact that they're charged with capital  
 13   murder, that doesn't mean they're necessarily guilty of capital  
 14   murder, right?

15      A. No.

16      Q. And the fact that just because they're found guilty  
 17   of capital murder, you don't automatically get the death  
 18   penalty. Remember, there's two choices.

19      A. Right.

20      Q. Are you open-minded toward both of the choices?

21      A. I am open-minded. These are people and I do believe  
 22   they have a right to have a very fair trial. I mean, I would  
 23   want that for myself. I can't say more than if it was me, you  
 24   know. I haven't been in this position before so.

25      Q. And that's a good example. You want those rights

1    yourself if you're ever charged with something, and you want to  
 2    make sure the jury's very careful in their consideration of the  
 3    thing?

4       A. Yes.

5       Q. But, you know, sometimes people say, "Well, he's  
 6   guilty of capital murder, automatically give him the death  
 7   penalty." I always tell them, "There's nothing automatic in  
 8   here." If it was automatic we wouldn't need jurors. The judge  
 9   would just say death penalty, the DA would say death penalty.  
 10   But the law says that only the jury can make that decision. A  
 11   district judge cannot sentence somebody to die. The DA's  
 12   office, the DA can't just say, "Well, we want to kill that  
 13   guy." Only people on the jury can do that. But again, the  
 14   jurors have to be open-minded and be willing to hear everything  
 15   before they make a decision. Can you be that kind of juror?

16      A. Yes, I would definitely try.

17      Q. How do you feel about being on this kind of case?

18      A. A little nervous I'd have to say. Like I said, I've  
 19   never been on any type of jury, much less this type.

20      Q. Well, let me give you something to make your mind at  
 21   ease. There's no qualifications to be on this kind of case.

22      A. (Laughter.)

23      Q. Well, I take that back. You have to be fair.

24      A. You've got somebody's life in your hands, it's  
 25   important, so that makes me a little nervous, you know.

1       Q. And I understand that, but what I said is exactly  
 2   right. The judge is not gonna tell you, well, you can only  
 3   have been on three other juries for you to qualify to be on  
 4   this jury. All we're looking for is people to determine the  
 5   facts of the case. You're a fact finder. The judge will tell  
 6   you what the law is at the end of the trial. He's kind of gone  
 7   over it somewhat already, but the question is all the jury does  
 8   – and I think you've said it -- you want to be a fair juror  
 9   because you'd want people to judge you fairly. And it's okay  
 10   to be a little nervous because, my, gosh, remember that first  
 11   day when you came in the courtroom and you saw all those people  
 12   there and the judge – and you're probably thinking, gosh,  
 13   what's going on? And the judge came down and said, "Folks,  
 14   this is a criminal case." And a lot of people say, "Oh, I'm  
 15   gonna be getting a DWI or shoplifting or a burglary case." And  
 16   the judge said, "This a capital murder case. The defendant's  
 17   charged with murdering somebody while robbing them. That means  
 18   the jury may have to make a decision on the death penalty."  
 19   And I saw people out there in the audience. They were like --  
 20   some people were like going, "Oh, my gosh, I can't sit on this  
 21   kind of case." Then other people were going like, "Oh, yeah,  
 22   really?" You know, they were interested. And then some people  
 23   were saying, "Gosh, I better sit up a little straighter and  
 24   listen a little closer because this is pretty serious  
 25   business." How did you feel about when you heard --

1 A. I was the one sitting up straight listening. I  
 2 pretty much did the whole time. But, yeah, it was surprising.  
 3 Q. It was surprising and that's why you saw -- I don't  
 4 want to say the word freaking out, but some people were going  
 5 like, "Oh, my gosh, I could never do this kind of case. Give  
 6 me some other kind of case." And other people were kind of  
 7 blasé about it. But then, I think the serious ones were the  
 8 ones who listened a little more closely and paid attention so  
 9 they could be good jurors.

10 The question is can you sit on that kind of  
 11 jury? I mean, if the judge -- if you're selected to sit on  
 12 this jury and you're qualified, can you sit there and make that  
 13 decision even though it's an awesome decision?

14 A. I could make that decision. I mean, there are -- all  
 15 of us have very busy lives and hectic ones, and even tonight,  
 16 you know, I'm a little worried because my kids are home alone  
 17 right now and stuff, but I would do my best if I did get  
 18 selected.

19 Q. And that --

20 A. I take it very seriously.

21 Q. And there's some people out there that say, "Look,  
 22 Mark, I believe in the death penalty, it's a good law, I think  
 23 it's a good law, I support it, but don't make me make the  
 24 decision, don't make me."

25 A. Yes.

1 guilty?  
 2 A. Yes.  
 3 Q. And simply, too, that if you think that he's guilty,  
 4 would you automatically vote for the death penalty?  
 5 A. No.  
 6 Q. Would you keep your mind open mind --  
 7 A. Yes.  
 8 Q. -- and equally consider life as well as death?  
 9 A. Yes.

10 Q. Okay. Because that's what we're looking for. The  
 11 judge said it perfectly the first time. We're looking for  
 12 open-minded people. And right now you're not leaning toward  
 13 the death penalty or toward a life sentence, right?

14 A. Correct.

15 Q. And that's good because you don't want to go in there  
 16 with any preconceived notions or judgments and such. You  
 17 probably want to wait till they hear the evidence?

18 A. Exactly.

19 Q. And that's all we're gonna ask you to do. The reason  
 20 this is a capital murder, as I said quickly, was it's murder  
 21 plus robbery. And it basically says, "while you're committing  
 22 robbery or attempting to commit robbery." In other words, you  
 23 can be trying to rob somebody or actually robbing them. It  
 24 doesn't have to be like a successful robbery or a complete  
 25 robbery. As long as you take something from somebody by force,

386

1 Q. And I always tell people, "Well, you know, it's your  
 2 civic duty sometimes to follow the law."

3 A. Exactly.

4 Q. And I think you fit in that category, you know. You  
 5 would prefer not to have to make that decision because I don't  
 6 think anybody is happy about it.

7 A. No.

8 Q. But the simple fact is, can you do your civic duty  
 9 and carry through with it, if that's what you think the  
 10 evidence is?

11 A. Yes, sir.

12 Q. You have to look at it from my perspective. I told  
 13 you the very first day the State's seeking the death penalty.  
 14 I don't like to sandbag people, blind side them. I tell them,  
 15 we're gonna ask for death penalty. There's gonna come a time,  
 16 Ms. Foutch, that I'm gonna stand in front of you and say,  
 17 "Based on the evidence and based on the facts of the case, I'm  
 18 gonna ask you to answer the questions in such a way that that  
 19 person over there is executed by the State." And I want you to  
 20 look at him and tell me, can you do that if the evidence calls  
 21 for it?

22 A. Yes.

23 Q. Okay. I'm gonna turn it around on you too and say,  
 24 is it true that if the evidence is not there, if we don't prove  
 25 the case beyond a reasonable doubt, can you find him not

388

1 or the threats of force, that's robbery. And if you do the  
 2 murder while in the commission of that, that's what makes it  
 3 capital murder.

4 And just because it's capital murder -- you've  
 5 never been on a jury trial before, but generally speaking, in a  
 6 criminal case, what happens is there's a range of punishment.  
 7 Like say you're on a burglary case and the range of punishment  
 8 is two years to 20 years in prison. And the jury hears all the  
 9 evidence and they pick a number, you know, two years, five  
 10 years, ten years, 20 years. In this case, you don't pick a  
 11 number and you don't even pick death or life in prison. What  
 12 you do is answer two questions, and based on how those  
 13 questions are answered, he's sentenced to death or life. So  
 14 you don't check off we vote for death we vote for life.

15 A. Okay.

16 Q. The second -- the first part of the trial is,  
 17 generally speaking, just about what happened that day. Is he  
 18 guilty, is he not guilty. The second part of the trial you  
 19 might get to hear additional evidence, like what his  
 20 background. Is it good background, bad background, you know,  
 21 what other stuff in his past he may or may not have done. And  
 22 then after you hear that second part of the trial you might get  
 23 to then you hear -- I'm sorry, then you would decide on how to  
 24 answer the question. The first question is right behind you  
 25 and I ask you to read it with me.

1 A. Okay.

2 Q. "Is there a probability that the defendant would  
3 commit criminal acts of violence that would constitute a  
4 continuing threat to society?" Now, we call that the future  
5 dangerousness question. In other words, do you think he can be  
6 a danger in the future? Key words in there I want you to look  
7 at is the first one it says, "Is there a probability." Now,  
8 unless you got a crystal ball and you can say for certain  
9 what's gonna happen, you can't answer that question.

10 A. Right.

11 Q. But the law doesn't require me to say for sure  
12 certainly. It just says probability. The next part says,  
13 "that the defendant would commit criminal acts of violence."  
14 Sometimes people say, "Well, I could only give him the death  
15 penalty if I think he's gonna murder again or do a capital  
16 murder again." And I say, "The law just says criminal acts of  
17 violence. That could be assaulting somebody, punching them in  
18 the nose or whatever."

19 And then the last part of the sentence says,  
20 "constitute a continuing threat to society." You've probably  
21 heard a phrase like that.

22 A. Uh-huh.

23 Q. The thing I want to point out to you is sometimes  
24 people come up to me and say, "Well, Mr. Skurka, why do you  
25 have to go for the death penalty? Why don't you just put him

1 lessen or make less severe the punishment?" Because the two  
2 choices are death and life in prison. The judge asks you, is  
3 there a sufficient mitigating circumstance, a reason, you  
4 should lower the sentence. Because that's what that word  
5 means. Mitigating means lessen or make less severe. In other  
6 words, they did the crime, but is there a reason to reduce the  
7 sentence and give them death -- life instead of death?

8 A. Okay.

9 Q. Now, I want to put you on the part -- put you on  
10 trial here. Not you on trial. We'll put your kids on trial.

11 A. Put my kids on.

12 Q. Say you have -- and I'm sure your kids are perfect,  
13 they're not like mine that give me a lot of problems. But say  
14 you have two kids and they're teenagers say, and you have a  
15 curfew for them at 11:00. And the curfew is 11:00, that's it.  
16 The bottom line is curfew 11:00. And what happens is one  
17 night, two of them break curfew. The first one comes in at  
18 11:03, misses curfew by three minutes. And you say, son, what  
19 happened? I'm assuming it's a boy because boys are always  
20 worse than girls. Son, what happened? He says, I would have  
21 been here at 10:45 and I had a flat tire and it took me 15 or  
22 20 minutes. I broke curfew because of that. Then this kid is  
23 your good kid because this is the first time he's ever broken  
24 curfew. He's been out a lot of times. He's never broken  
25 curfew before. This is his first time.

390  
1 in prison and that way he can't hurt anybody again?" And I  
2 always say, "Well, wait a minute. Just because you're locked  
3 in prison doesn't remove you from society, because why not?  
4 There's other people in the prison."

5 A. People in prison.

6 Q. Like who?

7 A. Guards, prisoners, staff. I mean, there's --

8 Q. That exactly right. It's not like we put people in  
9 the desert island and they're never gonna see another human  
10 being again. Would you agree with me then that prison is a  
11 part of society?

12 A. Yes.

13 Q. Sure. So just because you put somebody away in  
14 prison doesn't mean they're never gonna hurt anybody again?

15 A. Correct.

16 Q. I mean, their rights may be reduced, but they're  
17 still exposed to society. And have you heard about -- you've  
18 heard about people like that hurting guards or hurting other  
19 prisoners?

20 A. (Nodding head up and down.)

21 Q. So the first question is yes or no, is there a chance  
22 he's gonna hurt somebody in the future. You answer that yes or  
23 no. If you answer it yes, you go to the second question. The  
24 second question is called mitigating circumstance question, and  
25 essentially, that means this. "Is there anything that would

1 Now, let's talk about the second kid which  
2 we'll call the bad kid. And I'm just kidding. It's not  
3 really your kid. But say the second one comes in and he  
4 doesn't come in at 11:03. He comes in at 3:00 in the morning.  
5 He comes in four hours past the deadline and he comes in  
6 smelling like beer. And you ask him, what's going on, why  
7 were you late? And he says, we were partying with my friends  
8 and I forgot about the time, and gee whiz, darn it, I'm just  
9 late. That's all he says. I was just drinking and partying  
10 with my friends. And then, unfortunately, this kid is, like I  
11 said, your bad kid. This isn't the first time he broke  
12 curfew. This is the sixth time so far this year he's broken  
13 curfew before. Okay. They both broke curfew. They're both  
14 equally guilty of breaking curfew. Are you really gonna  
15 punish them the same?

16 A. Probably not, no.

17 Q. Probably not. Why? Because the surrounding  
18 circumstances are different. That's what that question's all  
19 about.

20 A. Right.

21 Q. You know, a person will be guilty of capital murder,  
22 but there may be aggravating circumstances to make it a death  
23 sentence. There may be mitigating circumstances that lower the  
24 sentence. But you got to wait till you hear everything. When  
25 I first said your two kids broke curfew, you didn't know?

1 A. I didn't know, right.

2 Q. But you can kind of see that's a mitigating part that  
3 one was, you know, three minutes late, the other one is four  
4 hours late. One had a good reason, you know, to break curfew  
5 because, you know, he had a flat. The other one didn't have a  
6 good reason. And the one was the first time offender and this  
7 other one wasn't. See, it's kind of a trick question in that  
8 is there enough to lower the sentence to life? I didn't mean  
9 to say trick question. It's more of a check on the jury.

10 Remember checks and balances?

11 A. Right.

12 Q. You found the guy guilty of capital murder. You've  
13 answered that question, yes, he's a continuing threat to  
14 society. The judge says, "Okay. It looks like he's heading  
15 for the death penalty. But, jury, open your mind and listen."  
16 Can you consider all of the evidence, including what happened  
17 that day, the circumstances of the offense and the surrounding  
18 thing, like how heinous was the crime, how bad was his  
19 involvement in it? His character and background, was it a good  
20 background or bad background? Maybe the kid -- maybe the guy  
21 was an Eagle Scout and was a war hero years ago in Desert  
22 Storm. Maybe the guy's always been in trouble with the law.  
23 You have to listen to his character, both good or bad, and the  
24 personal moral culpability. Is there anything that would  
25 warrant -- is it enough to warrant that you lower the sentence

1 a defense to crime. Voluntary intoxication. If you go get  
2 yourself drunk or high on drugs, is that an excuse to crime?

3 A. No.

4 Q. Absolutely not. But the judge may say it's a  
5 possible mitigating circumstance. In other words, somebody  
6 says, "Well, he robbed the bank but he was drunk when he robbed  
7 the bank." Some jurors may say, "Hey, you know, he was drunk  
8 when he robbed the bank. Let's give him a break and lower the  
9 sentence." Other people may say, "I don't care if he was drunk  
10 or not, he still robbed the bank and he's got to be punished  
11 for robbing the bank." You see what I'm saying?

12 A. Yes.

13 Q. That's the thing that you can consider but what  
14 effect you give to it is up to the jury.

15 A. Okay.

16 Q. Okay? I guess the best way to say is you have to be  
17 open-minded and will you listen and fairly consider all these  
18 things before you, you know, make a decision?

19 A. Yeah.

20 Q. Okay?

21 A. Yes.

22 Q. And that's a fair scheme to follow, right?

23 A. Oh, definitely.

24 Q. You don't want to be jumping into anything one way or  
25 the other?

1 to life instead of death?

2 What is a mitigating circumstances,  
3 Ms. Foutch, is up to the jury. The jury makes this decision.  
4 The judge is not gonna say, "Well, because you hear this, you  
5 have to lower the sentence. Because you hear this, you have  
6 to lower the sentence." You may hear good and bad. The  
7 question is does the bad -- does the good outweigh the bad.  
8 You know, some people may say, "Well, we're gonna give him a  
9 break because he was on the honor roll, and he was a hero in  
10 Desert Storm ten years ago." Other people may say, "I don't  
11 care if he was on the honor roll. I don't care if he was a  
12 hero in Desert Storm, he still did this crime and that doesn't  
13 outweigh what he did." You see what I'm saying?

14 A. Yes.

15 Q. It's kind of like when you're evaluating your two  
16 kids. One you may ground for a day. One you ground for three  
17 weeks --

18 A. Right.

19 Q. -- because of the differences. And that's the trick.  
20 To be a fair juror you have to wait till you hear that  
21 evidence. And it may be good, it may be bad, but you can't  
22 just be leaning one way or the other because you probably want  
23 to hear about their background, right?

24 A. (Nodding head up and down.)

25 Q. Now, the law also says voluntary intoxication is not

1 A. No.

2 Q. And you probably want to know what the past is. Now,  
3 that doesn't mean you necessarily have to make a decision on  
4 the past. You can make a decision on just the crime itself.  
5 The law says, if the crime is bad enough and you think that  
6 outweighs any mitigating circumstance, that's fine. But you  
7 have to be able to listen and consider those things. You know,  
8 maybe he came from a broken home or maybe he was in a war or  
9 something like that. I don't know what it is. If it is, then  
10 the question is, is there enough.

11 Okay. The last part I want to talk to you about  
12 is a couple of things. I know you got four kids and I can't  
13 remember all their ages. I think they're kind of younger and  
14 teenagers and stuff?

15 A. Yeah.

16 Q. I hope they don't break curfew.

17 A. Not so far. Not so far.

18 Q. Well, here's the thing. Sometimes people say -- I  
19 don't know if you felt that way, but you know that first day we  
20 came in, some people didn't know who was on trial. And the  
21 judge pointed out to Mr. Ramirez over here, right?

22 A. Yes. And I didn't even see him that day either.

23 Q. He was kind of stuck over there in the corner.

24 A. Yeah.

25 Q. But we're not talking about somebody you see on TV or

1 read in the paper. That's him. Do you think you can look at  
 2 him and tell me if you can make a decision based on the  
 3 evidence that may call for his execution, if the evidence  
 4 warrants it?

5 A. Yes.

6 Q. Okay. The second thing I want to talk to you about  
 7 is sometimes people have told us in the jury, "Well, gosh, the  
 8 first thing I saw was he's kind of young, you know, and he  
 9 doesn't look that bad, you know." And I tell them, "Well, you  
 10 can't make a decision on what a person looks like." Right?

11 A. Oh, definitely.

12 Q. Sometimes people come in -- and I've been trying  
 13 cases for 22 years and they always think the guy is gonna look  
 14 like Charles Manson, or some biker dude, you know, all scary  
 15 looking guy. And generally, they don't look like that. Child  
 16 abusers, they always say, "Oh, they think it's some guy wearing  
 17 a rain coat, a dirty old man hanging around the playground."  
 18 It's not necessarily that way.

19 Would you agree with me that you make a  
 20 decision on what the person did and not what they looked like?

21 A. Oh, yes.

22 Q. Okay. The last area I want to talk to about is some  
 23 legal questions. First of all, remember that the indictment is  
 24 not evidence of guilt. Just because he's been charged with a  
 25 crime doesn't mean he is guilty of the crime, correct?

398

400

1 A. That's correct, yes.

2 Q. And the other thing is the presumption of innocence.  
 3 Remember the judge says he starts presumed innocent. If you  
 4 had to vote right now you'd have to vote innocent.

5 A. He's innocent, yes, sir.

6 Q. And that's because the State hadn't proven the case  
 7 or hadn't brought any evidence yet?

8 A. Right.

9 Q. Now, just because he's presumed innocent doesn't mean  
 10 he is innocent. It's just he starts with that presumption of  
 11 innocence. It's like a bubble, you know. But once the  
 12 evidence comes you could burst that bubble, and say, "Oh, I  
 13 think he's now guilty beyond a reasonable doubt." But you've  
 14 got to start them at innocent, right?

15 A. Yes.

16 Q. And that's just our law. This is America and that's  
 17 why we do it that way. He can testify if he wants to. If he  
 18 doesn't want to, he doesn't have to. And you can't hold that  
 19 against him. I don't know if he's gonna testify or not.

20 That's up to him and his lawyers.

21 A. Right.

22 Q. But if he doesn't testify, this judge is gonna tell  
 23 you in the written instructions, you cannot hold that against  
 24 him. And sometimes jurors say, "But gosh, you know, I want to  
 25 hear what he says. I can't make a decision until I hear what

1 he says or what they put on." And the law says, "No. You've  
 2 got to make a decision based on the evidence you hear." And  
 3 you can't just say, "Well, I'm gonna hold it against him  
 4 because he didn't testify." You won't do that, will you?

5 A. No, sir.

6 THE REPORTER: Can you give me just a minute?

7 MR. SKURKA: Sure.

8 (Pause in proceedings.)

9 MR. SKURKA: Judge, I think -- are you ready,  
 10 Sara?

11 THE REPORTER: Yes.

12 Q. (BY MR. SKURKA) I think that's all the questions I  
 13 have, unless you have any questions of me?

14 A. Not at this time.

15 Q. The bottom line is can you be fair and impartial?

16 A. I will do my best.

17 Q. You have not made up your mind one way or the other?

18 A. No, sir.

19 Q. You'll listen to all the evidence before you make up  
 20 your mind?

21 A. Yes.

22 Q. That's all I can ask you to do. Thank you, ma'am.

23 A. Thank you.

24

25

398

1 VOIR DIRE EXAMINATION

2 BY MR. JONES:

3 Q. I get to ask the questions.

4 A. Okay.

5 Q. I'll try not to go over the same things that  
 6 Mr. Skurka did except for the ones that I'm concerned about.

7 A. Okay.

8 Q. We have -- we have the death penalty in Texas as a  
 9 form of punishment.

10 A. Yes.

11 Q. And it's only -- it's only available for homicides,  
 12 murders which -- and only available for murders that have some  
 13 kind of an aggravating circumstances attached to them. I take  
 14 it from your responses in the questionnaire and from your  
 15 answers here is that you generally are in favor of that being a  
 16 punishment option in Texas?

17 A. Yes.

18 Q. Do you believe that Texas society benefits from  
 19 having that option for these kinds of offenses?

20 A. Yes, I do.

21 Q. What can you -- can you tell me what -- articulate  
 22 what benefit or benefits you see that the death penalty gives  
 23 us?

24 A. You know, it's a little tough when you grow up with  
 25 it to some extent. You know, I remember being in school and

1 having debate class and we'd have to debate the subject of the  
 2 death penalty.  
 3 Q. Really?  
 4 A. Yes. And I have to say, you know, maybe it's the way  
 5 we're raised a little bit, because I did live away from Texas  
 6 for a long time in states that did not have it. I do believe  
 7 they had a good court system but I didn't always agree with it.  
 8 I do still believe that the death penalty does hold a place for  
 9 some crimes.

10 Q. Okay.

11 A. I do believe that some people, even in prison, could  
 12 cause harm to other people, that yes, they are there because  
 13 they did something wrong, but they don't need to be at risk as  
 14 well.

15 Q. Okay. In the old days – I say the old days, 20, 30  
 16 years ago when Texas had the death penalty, the Supreme Court  
 17 changed some rules.

18 A. Uh-huh.

19 Q. It used to be in a death penalty case the jury would  
 20 go back into the jury room and when the trial was over and  
 21 they'd say, "Okay, folks what do you want to do?" They'd say,  
 22 "Life or death?" They would write the verdict on a piece of  
 23 paper. Well, now the rules are that the Supreme Court  
 24 basically says that before a jury can assess the death penalty,  
 25 vote on the death penalty, they have to consider certain

1 ten votes to get a no verdict.

2 A. Oh, okay. I understand.

3 Q. But if it's against him it takes 12.

4 A. Right.

5 Q. If the jury votes no on Special Issue No. 1, it's  
 6 instructed to stop deliberations. They return the verdict form  
 7 to the Court, and the Court will assess what punishment?

8 A. Okay.

9 Q. No, what punishment? I'm asking you.

10 A. Life.

11 Q. Life because that condition is not met?

12 A. Right.

13 Q. If the jury votes yes, it's instructed to continue to  
 14 deliberate on the Special Issue No. 2. Would you read Special  
 15 Issue No. 2 and tell me when you're finished? Read it  
 16 silently.

17 A. Okay. I'm done.

18 Q. Is there any word or phrase in that question that you  
 19 do not understand?

20 A. No. I do believe I understand it.

21 Q. Okay. What's the verb "to mitigate" mean?

22 A. To mitigate?

23 Q. Yes.

24 A. That means to lessen.

25 Q. That's correct. To lessen what in this – in the

1 things, okay? It's supposed to be – instead of being an  
 2 arbitrary decision it is supposed to be a guided one.

3 A. Right.

4 Q. And there's much debate on whether the current system  
 5 really does guide or whether the jurors really are guided by  
 6 it.

7 A. Okay.

8 Q. But that's for our legislatures to debate. Really,  
 9 there are three conditions that must be met before a person can  
 10 get the death penalty in Texas. One, the person has to be  
 11 found guilty --

12 A. Yes.

13 Q. -- of capital murder. If that occurs, the State  
 14 moves into a second phase, the punishment phase. The jury  
 15 hears additional evidence, which are relevant to these two  
 16 special questions called special issues. How those two issues  
 17 are answered will determine which punishment is imposed. And  
 18 you'll hear evidence relevant to both of them.

19 A. Okay.

20 Q. And with that evidence, you'll attempt to make a  
 21 decision. On Special Issue No. 1, which is fairly clear, if  
 22 the jury answers yes to that question, it must agree that it's  
 23 yes by -- unanimously by a vote of all 12. If ten -- if ten  
 24 jurors vote no, that will authorize a verdict of no. In other  
 25 words, if the vote is in favor of the defendant, it only takes

1 context of this endeavor?

2 A. Well, to lessen from the death penalty to life.

3 Q. That's right. To lesser the punishment.

4 A. The lesser the punishment, yes.

5 Q. So the judge will instruct you that any evidence  
 6 that's before you which would cause you to want to vote for a  
 7 lesser punishment, that's a mitigating circumstance?

8 A. Yes.

9 Q. Okay. Now, in order to determine whether there are  
 10 mitigating circumstances, the question directs you to consider  
 11 certain things. The first one is the facts and circumstances  
 12 of the offense, which you've already heard about in the first  
 13 stage. The second is the defendant's character and background.  
 14 If I say that you're a person of good character, what does that  
 15 mean?

16 A. That means that there are things -- you do things  
 17 well in life for you and for other people.

18 Q. Okay. Do you agree that our society has a general  
 19 code of moral conduct and certain things to be considered to be  
 20 moral and certain things to be considered to be immoral?

21 A. Yeah. I mean, there can be some gray, but, yeah, I  
 22 do believe there's right and wrong.

23 Q. Boy Scout Law contains a whole list of them, the Ten  
 24 Commandments. These are places that -- so a person who has  
 25 good character is somebody who tends to adhere to that code.

1 Someone's bad character is one that deviates from it. What  
 2 about background, what does that mean?  
 3 A. Their background is what they've done in the past.  
 4 Q. That's right. Their biography, their social history.  
 5 A. Yeah.  
 6 Q. In this kind of case, the Supreme Court directs the  
 7 defense to discover and to prove up the defendant's background  
 8 good or bad, okay?  
 9 A. Okay.  
 10 Q. And as you might expect in a case like this, you're  
 11 likely to hear evidence of a bad background, you know, like a  
 12 person's family history. And you might hear evidence that the  
 13 defendant was born, you know, had a family that didn't take  
 14 care of him or abused him when he was growing up.  
 15 A. Okay.  
 16 Q. If you heard evidence of that kind, could you  
 17 consider it? Let me -- before I ask you that question, what  
 18 does the verb "to consider" mean?  
 19 A. To think about.  
 20 Q. Exactly. To think about with a view towards doing  
 21 something about what you're thinking about?  
 22 A. Okay. Yeah.  
 23 Q. So, in this case, if you can consider this with a  
 24 view towards voting for a life sentence?  
 25 A. Yes.

1 Q. Okay. It doesn't say you have to do it?  
 2 A. Right.  
 3 Q. It just says, think about it?  
 4 A. Right.  
 5 Q. Okay. So if your -- if you're presented with  
 6 evidence about a person's background, will you consider it?  
 7 A. Yes.  
 8 Q. Okay. All right. And on the issue of whether in  
 9 your mind you should vote for life rather than a death  
 10 sentence.  
 11 Personal moral culpability, what does that  
 12 mean?  
 13 A. That one's a little tougher. I have a hard time  
 14 explaining it. I kind of know how I feel about it but --  
 15 Q. Do your best.  
 16 A. I'm trying to. You know, kind of what they're made  
 17 of, kind of simple, good or bad. I mean, I guess I'm probably  
 18 saying it wrong, not saying what I want to say. That one, like  
 19 I say, it's tough for me to explain.  
 20 Q. And I think you were given the example of two  
 21 defendants --  
 22 A. The two --  
 23 Q. -- the two burglars.  
 24 A. Uh-huh.  
 25 Q. And one was the motive for the one stealing was to

1 feed his starving children, okay?  
 2 A. Right.  
 3 Q. And if you were the judge you probably wouldn't give  
 4 -- the punishment wouldn't be the same in those two cases,  
 5 would it?  
 6 A. Right.  
 7 Q. You'd probably give the guy that was stealing to help  
 8 his kids a lesser punishment. How would you rationalize that  
 9 if somebody asked you? They're both -- they both committed a  
 10 crime. Burglary is burglary.  
 11 A. Burglary is burglary.  
 12 Q. Theft is theft?  
 13 A. It is.  
 14 Q. So how could you justify giving the one lesser  
 15 punishment than the other?  
 16 A. Well, in the example I was given, the one didn't seem  
 17 to have a lot of care for anything, whereas the other one  
 18 seemed to be desperate and trying to take care of others, not  
 19 just doing it for their own self-gratification.  
 20 Q. Okay. Do you believe -- do you believe in the  
 21 doctrine of free will?  
 22 A. Yes.  
 23 Q. In other words, once we reach a certain stage of  
 24 majority, we have the power to choose?  
 25 A. We do choose.

1 Q. And we can choose one way or the other?  
 2 A. Yes, sir.  
 3 Q. Okay. So the question of moral culpability really  
 4 has two elements if you will. One is does -- does the person,  
 5 the defendant, know what the rules are? In other words, did --  
 6 from the time that he was born until the time of that date of  
 7 the offense, is there evidence to show that he learned what the  
 8 rules were, okay?  
 9 A. Okay.  
 10 Q. Where did your -- you've got four kids?  
 11 A. Yes.  
 12 Q. Are they learning the rules?  
 13 A. Yes, sir.  
 14 Q. And where do they get those rules from?  
 15 A. From me, from my their teachers, from their  
 16 grandparents, from their scout leaders. I mean, it's endless.  
 17 I put them in things that they do learn these things.  
 18 Q. That's where I got it. Okay. So do you agree that  
 19 some people in our society aren't so lucky to have the  
 20 advantages of your children?  
 21 A. I do believe that, yes.  
 22 Q. Okay. So the question is in a particular case, does  
 23 the defendant know what the -- when we say that he knows what  
 24 the rules are? Okay. So you say, well, yes. Then the next  
 25 part of the -- the next element of moral culpability is when

1 you have to choose between one course of action or another that  
 2 involves judgment.

3 A. Yes.

4 Q. Okay. And the question is, is there anything going  
 5 on in this case which would affect the judgment of the  
 6 defendant in choosing a particular course of action? For  
 7 example, in our hypothetical, the man who was stealing for his  
 8 -- to feed his children --

9 A. Yes.

10 Q. -- what was affecting his judgment?

11 A. What was affecting his judgment? At the time that he  
 12 would steal, his desperation to take care of his children.

13 Q. Okay. And that would cause you to --

14 A. That -- you would weigh the difference between  
 15 feeding your hungry children that are starving and committing a  
 16 crime. You would take the punishment to help them --

17 Q. Okay.

18 A. -- I believe.

19 Q. But starving children was a factor that affected his  
 20 judgment?

21 A. Yes.

22 Q. Something that we can consider --

23 A. Yes.

24 Q. -- and give effect to --

25 A. Yes.

1 circumstance. It might be a mitigating one. It depends --

2 A. Okay.

3 Q. -- on things. I think you -- no, I'm convinced that  
 4 you understand what's involved here.

5 Now, in order -- what answer to Question No. 2  
 6 will reduce a life sentence?

7 A. A life sentence? An answer of no.

8 Q. The question --

9 A. Oh --

10 Q. No, look at the question --

11 A. I'm sorry. I misunderstood. I'm sorry.

12 Q. That asks for a yes or no answer. And what answer  
 13 would produce a life sentence?

14 A. No.

15 Q. Okay. If you answer that question no, you're saying  
 16 there's no mitigating circumstance --

17 A. Oh, I'm sorry. Okay.

18 Q. No, you don't have to be sorry. I just need you to  
 19 understand it.

20 A. I guess I'm stuck on the first one that -- okay.

21 Q. That's why I'm asking you the question.

22 A. Right. If you find mitigating circumstances you  
 23 would -- it would be a life sentence as opposed to the death  
 24 penalty.

25 Q. In your book?

1 Q. -- in deciding what the punishment is?

2 A. Yes.

3 Q. There might be other things?

4 A. Sure.

5 Q. A person's mental ability, somebody that's borderline  
 6 retarded?

7 A. Yes.

8 Q. Somebody that may be under the influence of drugs or  
 9 alcohol which might -- depends on the circumstances. But a  
 10 person may have a mental disease. You know, it might affect  
 11 his ability to conform his conduct to the law. Of course,  
 12 you'd have to have evidence on this?

13 A. Yeah.

14 Q. But these are things that might affect a person's  
 15 judgment, and if the juror feels like, well, gosh, you know,  
 16 that's unfortunate. So does that help you with understanding  
 17 moral culpability?

18 A. Yes.

19 Q. Okay. Moral -- the word "moral" suggests, once  
 20 again, a code --

21 A. Right.

22 Q. -- of conduct from the various sources that we  
 23 discussed. And so we need to know, does the defendant know  
 24 what the code is; and number two, what affected his judgment on  
 25 the day in question? And that might be an aggravating

1 A. Because if you found that it was -- these did not  
 2 lessen that, then it would be.

3 Q. Now, a yes answer to number 2 means life, a no answer  
 4 means death.

5 A. Okay.

6 Q. Okay? I like that because yes is a positive and no  
 7 is negative. If you answer that -- if the jury answers that  
 8 question no, it takes a unanimous vote against the defendant,  
 9 it takes all 12. Twelve people have to make an individual  
 10 decision that the answer should be no.

11 A. Okay.

12 Q. However, how many votes -- if it's a favorable vote,  
 13 how many votes does it take?

14 A. Ten.

15 Q. Ten. So all the discussions are over and the final  
 16 vote is taken by the presiding juror it's ten to two for yes,  
 17 that's the verdict?

18 A. Okay.

19 Q. And that will produce, what sentence?

20 A. Ten to two.

21 Q. For yes?

22 A. For yes.

23 Q. And that --

24 A. That would be -- that would be --

25 Q. What kind of sentence?

1 A. That would still be a life because you need a  
2 unanimous 12.

3 Q. That's right. A life sentence. See how it works?

4 A. Yes.

5 Q. If you find yourself on this jury and we get to this  
6 -- I'm not saying we're even gonna get to this question. It  
7 may be the hardest question you've answered in your life.

8 A. Right.

9 Q. Because it's another person's life basically.

10 A. Definitely.

11 MR. JONES: Okay. I don't have any further  
12 questions.

13 THE COURT: Anything else?

14 MR. SKURKA: We have no other questions,  
15 Judge. Thank you, ma'am.

16 THE COURT: All right. Will you wait in the  
17 jury room for a second while I talk to the lawyers.

18 VENIREPERSON NO. 84: Yes. Thank you.

19 (Venireperson exits courtroom.)

20 THE COURT: All right. What says the State?

21 MR. SCHIMMEL: Your Honor, the State will  
22 accept this jury.

23 THE COURT: All right. What says the defense?

24 MR. JONES: We will accept her also.

25 THE COURT: All right. Let's bring her in.

1 MR. JONES: No. 9.

2 (Venireperson enters courtroom.)

3 THE COURT: All right. Ms. Foutch, you have  
4 been selected to be on this jury. I know we talked about this  
5 before. Don't read the local paper, don't watch the local  
6 news. We just want you to get what -- you know, about the  
7 facts of this case from the Court. And don't talk to anybody  
8 about the facts of the case. If they try to talk to you, say,  
9 no, I can't talk to you, okay? When we're done, maybe, but  
10 not now.

11 We expect this trial to begin on December 1st.

12 We will let you know. In any event, we're gonna contact you  
13 just to confirm, and if it changes we'll let you know, okay?

14 JUROR NO. 9: All right.

15 THE COURT: Thank you so much for spending the  
16 day for us.

17 JUROR NO. 9: Thank you.

18 MR. SKURKA: Thank you.

19 MR. JONES: Thank you.

20 (Proceedings adjourned.)

21

22

23

24

25

1 THE STATE OF TEXAS

\*

2

3 COUNTY OF NUECES

\*

4

5 I, Sara E. Rivera, Official Court Reporter,  
6 in and for the 94th District Court of Nueces County, State of  
7 Texas, do hereby certify that the above and foregoing contains  
8 a true and correct transcription of all portions of  
9 evidence and other proceedings requested in writing by  
10 counsel for the parties to be included in this volume of the  
11 Reporter's Record, in the above-styled and numbered cause,  
12 all of which occurred in open court or in chambers and were  
13 reported by me.

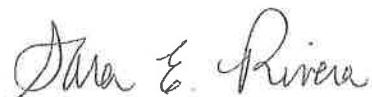
14 I further certify that this Reporter's Record of the  
15 proceedings truly and correctly reflects the exhibits,  
16 if any, admitted by the respective parties.

17 WITNESS MY OFFICIAL HAND, this the 25<sup>th</sup> day of  
18 September, A. D., 2009.

19

20

21



SARA E. RIVERA, Texas CSR 4626

22

Expiration date: 12/31/09

23

Official Court Reporter

24

94th & 117th District Courts

25

901 Leopard Street, Room 402

Corpus Christi, Texas 78401

Telephone: 361-888-0751

Facsimile: 361-888-0209